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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 370

REED & PRINCE MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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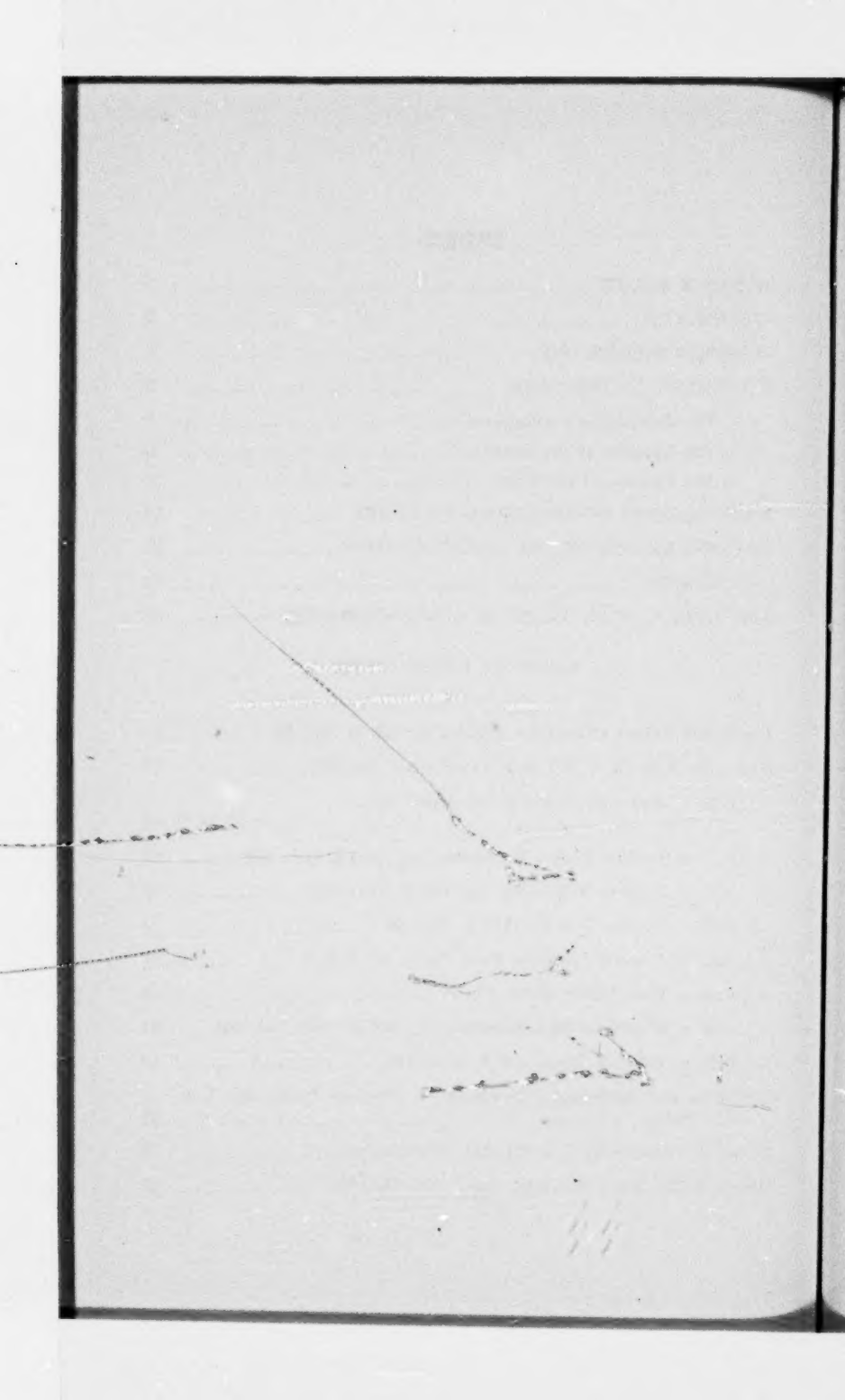

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Petitioner, Reed & Prince Manufacturing Company, prays that a writ of certiorari be issued out of and under the seal of this Court to review a decree of the United States Court of Appeals for the First Circuit entered on June 9, 1953, enforcing an order of the National Labor Relations Board.[1]

OPINIONS BELOW

The opinion of the Court below in this case is reported at 205 F. (2d) 131 (R. 447-463).

The decision and order of the National Labor Relations Board together with the Trial Examiner's Intermediate Report are reported at 96 NLRB 850 (R. 1-40).

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[1] The National Labor Relations Board will be referred to herein as the "Board"; the National Labor Relations Act, as amended, as the "Act".

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

The decree of the Court below sought to be reviewed was entered on June 9, 1953 (No. 4647, R. 464) and a petition for rehearing was denied on June 26, 1953 (R. 486).

QUESTION PRESENTED

Whether the obligation of an employer to bargain collectively with the union certified as the representative of a majority of his employees in an appropriate bargaining unit, which is imposed by § 8(a)(5) of the Act and defined in § 8(d) of the Act, requires an employer, either

(a) to agree to some of the union's proposals, or

(b) to advance some proposal of his own, meeting the union at least partway.

STATEMENT OF THE CASE

This litigation arose out of a series of some 13 conferences between Petitioner and the certified representative of its employees held for the purpose of negotiating a collective bargaining contract. As the court below correctly noted, "this is not a simple case where the employer has made a clear refusal to recognize or bargain with the certified representative of its employees. Rather, it is one where the employer engaged in a lengthy series of bargaining conferences, which got nowhere" (R. 449).

1. The Bargaining Conferences

The pertinent and undisputed facts [2] of these conferences may be summarized as follows:

On July 20, 1950, the Board certified the United Steelworkers, C.I.O. (referred to herein as "the Union"), as

[2] Unless otherwise noted, the facts recited are taken from findings of the Court below, the Board or the testimony of the Chief union negotiator who was called as the principal Board witness.

the representative of the production and maintenance employees at Petitioner's manufacturing establishment in Worcester, Massachusetts.

Sometime between August 1 and August 9 (R. 116-117), the chief negotiator for the Union telephoned Petitioner's president to ask when it would be convenient to start bargaining conferences (R. 49). He was subsequently advised that because of vacations it was impossible to get the management bargaining committee together until after Labor Day, i.e., September 4, 1950 (R. 117). After Labor Day, the Union representative called and requested a bargaining meeting on September 15 (R. 118), a request to which the company agreed.[3]

At the opening session on September 15, the Union was requested to supply written contract proposals. Such proposals were supplied soon after, and subsequently 12 additional bargaining conferences were held, running into early February, 1951.

On September 29, the date of the second bargaining conference, the Petitioner offered the Union an increase of 10c in the hourly rate of all the employees represented by it. The offer was not accepted at this conference nor at any of the conferences which took place during October (R. 29).

Finally, after the proposed increase had been rejected by the Union on November 7 (R. 90) and the impasse persisted through the meetings of November 14 (R. 402), November 29 (R. 30), Petitioner put it into effect by a notice given the employees on December 4 (R. 30). This so-called unilateral action was subsequently held by the Board to

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[3] In its decision, the Board took the Company to task for delaying the opening of the meetings, for "six weeks", and found its conduct in this respect one of the "elements" of bad faith it relied upon in making its ultimate adverse conclusion (R. 23, 33). The Board apparently overlooked the Union negotiator's own testimony to the effect that although the Company was prepared to meet any time after Sept. 4, it was he who selected a date almost two weeks later (R. 118). In its opinion, the Court below quotes without comment of its own the Board's finding (R. 452). Apparently this was one of the subsidiary findings the Court did not feel itself called upon to sustain (R. 460-461).

manifest bad faith, although the Board conceded that an impasse would have justified such action had the Board not concluded from other circumstances that the blame for the impasse was chargeable to Petitioner (R. 31).

During these conferences, the Union pressed its demands for a contract containing some form of union security (i.e., compulsory union membership), a wage increase of 15 cents or more, a check-off clause, a grievance procedure ending in arbitration, six paid holidays, a seniority provision, a pension and insurance plan (R. 453), and a liberalization of the Company's paid vacation plan, (R. 402-3), and premium pay for Saturday work as such (R. 456). These proposals, as formulated, were rejected by Petitioner (R. 453-456). Petitioner, however, did submit a written counter-proposal on seniority (R. 267, 454), and premium pay for Saturday and holiday work (R. 266-267). With respect to pensions and insurance, Petitioner offered its Blue Cross plan instead (R. 455). On the issue of vacations, it offered to incorporate into the contract its existing paid vacation plan (R. 129).

In the interim, after a meeting on November 14 had adjourned without agreement, Petitioner agreed to submit written proposals to the Union when the parties met again, the date having been set for November 22 (R. 402-403). The following day, the Union negotiating committee circulated a leaflet to the employees (R. 402-403) purporting to describe the November 14 meeting. The leaflet stated that the Company "felt very strongly against changing their present vacation plan, against paid holidays, against arbitration, against a progression system for day workers, against checkoff for Union dues, against any form of Union security, against a substantial wage increase." The leaflet went on to say:

> "They stated that if the Union could see its way clear to sign an agreement without these provisions in the contract possibly an agreement could be reached . . .
> ". . . The Union stated that the things that the com-

pany felt strongly against were basic provisions of any collective bargaining agreement, and that the Company had to make up its mind, now that the employees had organized themselves into a Union, that they had to go along with the provisions that had become standard in collective bargaining agreements. It appears that the Company is just stalling."[4]

At the bargaining conference of November 22, the Company did read certain contract proposals but prior to this conference a union meeting was held at which the members authorized a strike (R. 104, 458). Thereafter meetings were held in the presence of Federal and State conciliators, but the impasse which both sides had recognized in early November persisted (R. 458).

On December 27, the Union advised Petitioner that there would be a strike at the plant effective January 2, contending Petitioner was not bargaining in good faith with the Union (R. 458). The strike was called and was still in progress at the time of the hearing before the trial examiner (R. 458). In the course of the strike the Union resorted to physical violence on a widespread scale, but the trial examiner refused to entertain evidence of this, a ruling subsequently upheld by the Board and the Court (R. 463).

2. The Decision of the Board

It was not until the strike had been underway for five weeks that the Union filed charges alleging any violation of

[4] Both the Board and the Trial Examiner completely ignored this leaflet in their respective opinions. The Court referred to it, however (R. 459), as evidence the Company relied on to show that the ensuing stalemate resulted from the adamant insistence by the Union upon the acceptance of the basic provisions of its standard contract. The Court attached little significance to it, asserting the record showed that the Union bargaining efforts were marked by a considerable flexibility of approach (R. 459, 460), since the Union modified its proposals in important respects to meet Company objections. This finding (not made by the Board) flies in the face of the Union spokesman's admissions that he had never retreated from his demands on wages (R. 314), vacations (R. 314), paid holidays (R. 128), arbitration (R. 130), seniority (R. 314), union security (R. 314), and checkoff (R. 314)—in short, all the "standard" provisions.

the Act. There was a meeting on February 6, 1951, between the parties at which Petitioner's counsel reiterated the Company's rejection of a proposal by a Federal conciliator to submit the issues in dispute to arbitration (R. 113-114).[5] On that day, the Union filed charges of a violation of Sections 8(a)(1) and 8(a)(5) of the Act. (R. 24). A complaint issued and after a hearing, a trial examiner found that the Company had refused to bargain in good faith with the Union and thereby violated Section 8(a)(5), that the strike was caused by such refusal, and that therefore the subsequent solicitation of strikers to return to work amounted to a violation of Section 8(a)(1).

In his report the trial examiner held that Petitioner had exhibited bad faith in numerous respects. A majority of the Board[6] upheld his ultimate conclusion, although this same majority disagreed with the trial examiner on many of his most important findings against Petitioner (R. 34). The Board found that Petitioner's attitude on interim grievance procedure, a phase of the negotiations in which Petitioner's position was condemned by the trial examiner, did not constitute bad faith bargaining (R. 34) and that the trial examiner was in error in stating that Petitioner had "candidly challenged the Union to strike," pointing out that all Petitioner had done was to suggest to the Union as an argument for deleting the arbitration clause in the Union proposal, the fact that it was not proposing that the Union agree to a "no strike" clause. The Board also found that the record did not support the examiner's findings with respect to (a) pensions and insurance, (b) seniority, and (c) grievance procedure (R. 34).

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[5] The Court below mentions this incident. No inference adverse to Petitioner can be drawn from this event, however, as Section 203(c) provides that the refusal of either party to agree to a procedure suggested by the Federal Mediation and Conciliation Service shall not be deemed a violation of any duty or obligation imposed by the Act.

[6] This opinion was signed by three members of the Board, Member Reynolds dissenting and Chairman Herzog not participating.

In his dissent, Board Member Reynolds said:

> "I find myself unable to come to the conclusion that, on the record before us, the Respondent can be found not to have bargained with the Union in good faith. I am not persuaded that an affirmative case, based upon substantial evidence, of bad faith bargaining has been made out. I am legally obliged not to substitute my general opinion or suspicion for the type of evidence needed to support such a case. In the absence of any accompanying unfair labor practices, I am not prepared to find that the Respondent bargained in bad faith with the Union" (R. 38-39).

The majority of the Board apparently regarded the case as a close one, for in summarizing its conclusions (R. 32), it said:

> "*. . . no one of the separate elements in this case is in itself conclusive evidence of bad faith bargaining* [but] when the entire bargaining pattern of the Respondent is viewed in its totality the picture is clear. . . . We are convinced that the Respondent did not participate in the bargaining negotiations with the good faith required of it by law." [Italics supplied.] (R. 32.)

The "separate elements" described at some length in the Board opinion (R. 25-32) are summarized by the Board in its concluding remarks as amounting to five in number (R. 33-34):

> "(1) the delay in scheduling the first meeting and in furnishing the wage and pension data; (2) the insistence upon the presence of a stenotypist at the bargaining sessions; (3) the unreasonable withholding of acquiescence on admittedly trivial matters, such as notice posting facilities and the recognition clause;[7]
>
> (4) the hasty institution of the wage increase after the negotiations had broken down, without notifying the Union or in any way permitting the Union to share in

[7] These are the only two examples mentioned any place in the Board opinion.

the credit for the increase; and (5) the handling of the check-off issue."[8]

The Board also observed that Petitioner violated Section 8(a)(1) of the Act by soliciting the strikers to return to work and giving its assistance to a back-to-work movement started by certain admittedly rank and file employees. The responsibility of Petitioner for conduct of these employees was a litigated issue before the Board but has no relevance to this petition, for the Board apparently conceded (R. 36, fn. 22) that such actions by an employer in an attempt to end a strike would not have been improper if the strike had not been caused by an unfair labor practice—a finding which depends upon the correctness of the Board's antecedent finding of Petitioner's lack of good faith in the negotiations.

It is therefore apparent that in the minds of the Board members who participated in the majority decision, their ultimate conclusion depended upon the totality of the five subsidiary findings. Actually, the decision rested upon only four of the five grounds cited, for the fourth "element" (i.e., the unilateral wage increase) as we have pointed out, was deemed improper because of Petitioner's conduct in the other cited respects in the course of the negotiations.[9]

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[8] The Board took exception to the fact that *one* of the reasons Petitioner gave for rejecting the check-off was that it felt not legally required to bargain on this issue (R. 31-32), a position the Board viewed as legally erroneous, relying upon one of its own decisions. The Court below upheld the Board in this view, despite a contrary holding of a court of appeals for another circuit *N. L. R. B.* v. *Hughes Tool Co.*, 147 F(2d) 69 (C. A. 5).

[9] In reaching its conclusion the Board also found "support" for its holding upon the fact that the Company had previously been found guilty of an unfair labor practice as the result of a dispute in 1937, and that one of the rank and file employees active in the back-to-work movement was quoted by a witness as having said that Petitioner would never sign a contract with the Union.

This latter testimony was objected to as hearsay but the Board and the Court upheld its admission on the ground the Company had identified itself with the back-to-work movement. Since the impropriety of the Company's post-strike conduct, however, is dependent upon the basic question of whether the strike was caused by a refusal to bargain, it

3. The Opinion of the Court

Before the reviewing Court, Petitioner in its brief and argument assailed as either unsupported by evidence or as legally erroneous, the Board's four findings with respect to the conduct of the negotiations by Petitioner which led the Board to draw the further conclusion that the unilateral wage increase was unjustified, that the strike was caused by Petitioner's refusal to bargain in good faith, and that the subsequent attempts to induce the strikers to return to work were illegal.

In reviewing the findings on the four crucial points, the Court recited what the Board had said, but expressly abstained from agreeing with it on all the incidents which it itemized (R. 460). In fact, it disagreed with the Board on the issue of the presence of a stenotypist (R. 461), and seemed to agree with it only on Petitioner's attitude with respect to the check-off and its withholding of acquiescence to the Union's demand for bulletin board facilities and the language of the recognition clause.

In other words, the Court failed to sustain the Board with respect to two of the four elements of conduct which the Board had viewed in combination, but not standing alone, as constituting a refusal to bargain in good faith. Instead of setting aside the Board order, however, or remanding the case to ascertain what ultimate conclusion the Board might have reached if only half its crucial findings could be sustained, the Court decided to enforce the order on the ground that it was satisfied upon viewing the record in its entirety, that the ultimate finding of the administrative

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would seem that this incident has no significance, unless the Board's appraisal of the bargaining negotiations is sustainable.

Moreover, the Board itself, in one portion of its opinion made it clear that the grounds of its decision rested upon the five aspects of the negotiations of which it disapproved, since it stated:

> "As noted above, however, we believe that the specific factors relied upon [i. e., the five elements] amply support our finding that the Respondent has failed to exhibit the degree of good faith which the Act requires with respect to the obligation to bargain collectively" (R. 34).

agency would have been the same (R. 461-462). In reaching this conclusion, the Court expressed its standard of judgment as to what constituted good faith bargaining. Conceding that the Board may not "sit in judgment upon the substantive terms of collective bargaining agreements," [10] the Court said:

> "But at the same time it seems clear that if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations. See *Wilson & Co., Inc.* v. *N.L.R.B.*, 115 F. (2d) 759, 763 (C.A. 8th, 1940). See also Smith, The Evolution of the 'Duty to Bargain' Concept in American Law, 39 Mich. L. Rev. 1065, 1108 (1941). Thus if an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the union at least partway, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union. In other words, while the Board cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position, the employer is obliged to make some reasonable effort in some direction to compose his differences with the Union, if § 8(a)(5) is to be read as imposing any substantial obligation at all." (R. 450-451).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the First Circuit erred

1. In holding that the failure of an employer to agree to some Union proposal or his failure to advance a counterproposal meeting the Union at least partway may be construed as a breach of the obligation to bargain imposed by Section 2(a)(5) and defined in Section 8(d) of the Act.

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[10] *N. L. R. B.* v. *American National Insurance Co.*, 343 U. S. 395.

2. In making factual findings on matters not passed on by the Board and relying thereon to arrive at its decision when enforcing an Order of the Board.

3. In enforcing the Order of the Board.

REASONS RELIED ON FOR GRANTING WRIT

1. *The decision in this case presents an important question of Federal law.*

The issue presented is one of great importance in the administration of the Act since, as this Court has recognized, "enforcement of the obligation to bargain collectively is crucial to the statutory scheme" *N.L.R.B.* v. *The American National Insurance Company.*[11] As will be shown, *infra,* the Court below has evolved a theory of the application of those provisions of the Act, i.e., subsections 8(a)(5) and 8(d) which is contrary to Congressional intent, to the underlying principles set forth in previous pronouncements of this Court, and to the holdings of other courts of appeal.

Section 8(d) of the Act provides:

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .*" [Italics supplied.]

It would seem to be rendering mere lip service to the foregoing statutory provision to assert, as the Court did, that while this subsection prevents the Board from forcing employers to make any specific concession or to adopt any particular position, it nevertheless can be read as requiring

[11] 343 U. S. 395; 72 S. Ct. 824.

an employer to try to compose the difference between his own position and that taken by the party on the other side of the bargaining table. If this is indeed the correct view of the statute, it means that to the normal play of economic forces which produced the successive round of wage increases during the postwar period with its attendant spiral of rising prices, there is now to be added the force of legal compulsion to accelerate this trend.

In short, what the Court below is saying is that if an employer is confronted, let us assume, with a demand for higher wages, shorter hours, and more liberal fringe benefits in the form of longer paid vacation periods, pensions and insurance, he need not give in on any particular one of these demands, but nevertheless must make some concession in the way of higher labor costs to avoid being adjudged guilty of a refusal to bargain.

Until this decision it had been taken for granted that an employer was free to insist even on terms and conditions which the Board or a union might regard as niggardly or even onerous, provided that if the union were willing to accept such terms, he would not refuse to embody them in a written agreement. But if this decision is permitted to stand, it will mean that in the future, management negotiators who decline to satisfy union demands, at least to some degree, will be compelled by Board orders to grant concessions beyond what they conceive the economic situation might require.

In view of the fact that there are more than 20,000 [12] collective agreements in this country which come up for renegotiation each year subject to the provisions of Section 8(d), it will readily be perceived that the impact of the Court's decision on the whole field of industrial relations will be tremendous.

The quoted excerpt from the Court's opinion enunciating the view that employers are under a legal duty to meet

[12] Annual Report, Federal Mediation and Conciliation Service, Fiscal Year 1952, Table 1, p. 32.

union proposals at least partway is not, we submit, a mere dictum but is the doctrine upon which its decision rests. The same notion pervades other portions of the opinion, e.g., "the slightest chance of acceptance by a self-respecting union" (R. 461) and, less candidly stated, is present in the Board findings of bad faith respecting the posting and recognition clause proposals from which Petitioner withheld agreement. The Board asserted, for example, that Petitioner, while under no legal obligation to furnish bulletin board facilities, would have done so if dealing with the union in good faith (R. 27). The Court obviously approved this paradox, by observing in connection with these findings

> ". . . it may be wondered how the Company could in good faith even expect to arrive at an agreement if the major proposals submitted by the Union are refused on principle and assent on the minor ones is withheld as a matter of bargaining technique." (R. 460)

There is no finding by either the Board or the Court that at any stage of the negotiations Petitioner refused to discuss any of the proposals advanced by the Union. Nor is there any finding that Petitioner was determined not to sign a contract even upon its own terms had the Union been willing to abandon its demands.[13] Thus, the decision of the Court poses clearly the question of whether the duty to bargain in good faith requires an employer to agree to at least some of the Union's proposals or to make some concession of its own to the Union point of view. Consequently, we submit that this Court should grant this petition and make it unmistakably clear that the answer to this question is that there is no such duty.

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[13] The record would not have permitted any such finding, for the Union in the leaflet quoted *supra*, stated that the Company indicated willingness to make a contract if the Union abandoned its "standard" provisions, and the chief Union negotiator admitted on the witness stand that Petitioner had repeatedly urged the Union to accept less than it was demanding on the plea that if things worked out satisfactorily in the new contract, Petitioner might feel more inclined to grant some of the Union demands at a later date (R. 136-137).

2. *The decision of the Court below is not supported by the legislative history of Section 8(d).*

As stated by the Court in *American National Insurance Company, supra,* at p. 409, "The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case . . ." Nowhere in those standards, by inference or otherwise, has Congress legislated that one party to contract negotiations must find something in the other's proposals to agree to or else meet the other "partway." According language its ordinary common sense meaning, it is difficult to see how the obligation to bargain in good faith could require a "proposal meeting the union at least partway" in the face of the statutory assertion that "the obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

If there is any doubt as to the correctness of our position, it is put to rest by the legislative history of the Section. Section 8(d) is derived from Section 5(c) of S. 360, introduced in the 80th Congress by Senator Ball. This provision became Section 8(d) of S. 1126 which was the bill introduced in the Senate as a result of the hearings held by the Senate Committee on Education and Public Welfare.[14]

Section 8(d) was designed to reaffirm the law as stated by Chief Justice Hughes in *N.L.R.B.* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1, where he observed:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatsoever. It does not prevent an employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine. . . .' The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote in-

[14] The legislative history of this section is described at further length in the petition for rehearing (R. 469-473) and the legislative materials themselves are collected in the appendix thereto (R. 475-486).

> dustrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel . . ."

Similarly, the following observation:

> "Notwithstanding this language of the Court, the present Board has gone very far in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make." [15]

Thus, in the legislative history is the statement:

> "Another amendment to this section defines the term 'bargain collectively' and makes it clear that the duty to bargain does not require either party to agree to or to make a counterproposal. This was the original intent of this subsection, as is shown by Chief Justice Hughes' comment upon it in the *Jones and Laughlin* case (301 U.S. 1), but the Board itself in recent years has tended to read more content into this subsection than that decision of the Supreme Court would indicate was justified." [16]

The view of the Court below that Section 8(d) is "more or less declaratory of the law as it had been expounded in judicial decisions under the original Act" is correct. It is to be noted, however, that in *Jones & Laughlin* this Court did not state, by implication or otherwise, that there was an obligation to meet and confer with "a sincere desire to reach an agreement if possible" (R. 449), or to meet the union "at least partway" in order to reach an agreement. Indeed, it plainly asserted that the Act did "not prevent an employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' . . ." According to

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[15] House Report No. 245, Committee on Education and Labor, 80th Cong., 1st Sess., p. 19.

[16] Analysis of S. 360 (Hearings, Committee on Labor and Public Welfare, United States Senate, 80th Cong., 1st Sess., on S. 55 and S. J. Res. 22, Pt. I, p. 304).

this Court, therefore, the obligation imposed by the Act is one to meet and confer in good faith and not, as stated by the Court below, to meet and confer with a "sincere desire to reach an agreement if possible" and to meet the other side "partway" in an effort to achieve this. This is not to say that an evident predetermination *not* to agree to anything in any circumstances would not be indicative of such a pervasive bad faith as to amount to a violation of the statutory obligation. But such a determination is not to be inferred from mere evidence of a failure to compromise differences of position.

3. *The decision of the Court below is contrary to the pronouncements of this Court.*

This Court recently stated in *N.L.R.B.* v. *American National Insurance Company, supra,* at p. 301:

> "The National Labor Relations Act is designed to promote industrial peace by encouraging the making of *voluntary* agreements governing relations between unions and employers. *The Act does not compel any agreement whatsoever* between employers and employees. *Nor does the Act regulate the substantive terms* governing wages, hours and working conditions which are incorporated in an agreement." (Italics supplied.)

The facts in that case disclosed that the employer was "steadfast" in its demand that certain conditions of employment were to be reserved to it under the terms of the contract being negotiated. Indeed, the Union's capitulation to that demand was a condition precedent to any agreement whatsoever on any contract terms. It was in that posture that this Court carried out the mandate of Congress and ruled that the employer was doing nothing more than the provisions of Section 8(d) permitted.

Any similarity between the decision of this Court in that case and that of the Court below in the instant case is lacking. Not only did the employer there refuse to meet the union "partway" by adamantly insisting on its prerogatives

over certain so-called management functions, but it also evinced no desire whatever to reach an agreement by conditioning all bargaining on the union's surrender of its control over those functions.

Inherent in the decision of the Court below is the mistaken concept that parties engaging in contract negotiations must make concessions. This is so since otherwise it would not be possible to abide by the requirement of meeting each other "partway." But as stated by this Court ". . . the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[17] If the Board is so restricted, certainly the reviewing courts are also.

4. *The decision of the Court below conflicts with decisions of other Courts of Appeal.*

The theory of this Court regarding the obligation imposed by Section 8(d) of the Act on collective bargainers was properly applied in *N.L.R.B.* v. *Dealers Engine Rebuilders, Inc.*, 199 F. (2d) 249 (C.A. 8). The Board had found that the record in the case supported the refusal to bargain allegations of the complaint and that the employer had "generally failed to demonstrate any sincere purpose to reach an agreement." The reviewing Court reversed the Board without comment merely citing this Court's decision in *American National Insurance Co., supra.*

Likewise, in *Associated Unions of America* v. *N.L.R.B.*, 200 F. (2d) 52 (C.A. 7), the reviewing Court denied a petition to review and vacate which alleged, *inter alia*, that the employer had refused to bargain in rejecting a union proposal for a promotional plan. The Court in affirming the Board, stated that "the Act did not require the Company to accept any promotional plan it did not, in fact, find agreeable, and support is found for that proposition in what was said in *N.L.R.B.* v. *American National Insurance Co.* . . ."

[17] *N. L. R. B.* v. *American National Insurance Co., supra*, at p. 404.

The holding of the Court below also seems squarely in conflict with certain decisions of the Court of Appeals for the Fifth Circuit. In *American National Insurance Co.* v. *N.L.R.B., supra*, the Court, after approving the following language in the trial examiner's report,

> ". . . (the employer) had a right to refuse to agree to an increase in wages, to the designation of additional paid holidays, or to the granting of other conditions of employment more favorable than those existing. Assuming, but of course not deciding, that Respondent's employees were ill-paid and that Respondent could well afford to grant a wage increase, it was under no legal compusion to do so,"

went on to say:

> ". . . the persistence of the Board in asserting and pressing its view that the use in the National Labor Relations Act of the words 'collective bargaining' meant that the employer had to agree to terms proposed by the union, if in the opinion of the Board these terms were reasonable, and that a failure to agree to such terms was a basis for finding that the employer was not bargaining in good faith. Since, however, that term has been defined in the National Labor Relations Act, as amended . . . there is no longer any basis for the differences of opinion as to what it means or for Board orders in effect requiring the employer to contract in a certain way."

A similar rule was applied by that Court in *N.L.R.B.* v. *Hart Cotton Mills*, 190 F. (2d) 964, setting aside a Board order based upon a set of facts almost identical with those in the instant case. The same standard of judgment has also been applied by that Court in dismissing contempt citations. See *N.L.R.B.* v. *Whittier Mills*, 123 F. (2d) 725 (C.A. 5), and *N.L.R.B.* v. *Express Publishing Co.*, 128 F. (2d) 690.

5. *In applying standards of obligation not contained in Section 8(d), the Court below relied on matters not passed on by the Board to support its decision*

As this Court decided in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 71 S. Ct. 456, the scope of review under Section 10(e) of the Act, and Section 10(e) of the Administrative Procedure Act,[18] are the same. In the cited case, the Court explained that the requirement found in both Sections of the two Acts "for canvassing 'the record as a whole' in order to ascertain substantiality" was not "intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge whose findings within that field carry the authority of expertness which courts do not possess and therefore must respect."

The search by the reviewing court for substantiality is for the purpose of determining if there is evidence to support the findings made by the Board. It is not within the province of the Courts in the course of such searches to pluck from the record, evidence which in *its* view substantiates the Board's findings and ultimate conclusions. Congress has nowhere dispensed any such authority. In other words, ". . . an administrative order cannot be upheld *unless the grounds* upon which the agency acted in exercising its powers were *those* upon which its actions can be sustained." (Italics supplied.) *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94-95.

The Court below stated ". . . we do not necessarily have to sustain the Board on each and every one of its subsidiary findings . . . nor do we have to agree with the Board as to each and every one of the incidents which it specially emphasized in its decisions as indicating a lack of good faith on the Company's part . . ." (R. 460-461). The Court then gives a specific example of a Board finding which it states "we are not inclined to agree with . . ." (R. 461) and thereafter proposes an alternative finding with the comment

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[18] 60 Stat. 237, 243, 244; 5 USCA 1009(e).

"we think that the Board might well have lifted out from the record . . ." (R. 461).[19]

This assumption of the fact-finding prerogatives of the Board by the Court below was erroneous. As stated by the Court in *N.L.R.B.* v. *Southland Manufacturing Company*, 201 F. (2d) 244 (C.A. 4) at 246:

> "If Congress had intended to give a power of review similar to that on appeals in equity, it knew perfectly well how to do so. . . . The proposition was fully considered and was rejected because the effect of its adoption would have been to destroy the unified administration attained by the creation of a single agency and to make of the eleven courts of appeals eleven super agencies. Adequate judicial review was granted when the Courts were given powers to determine whether the findings of the agency have substantial support in the record considered as a whole . . ."

The same court in an earlier case stated that reviewing courts "are without power to find facts or to substitute their judgment for that of the Board."[20] Yet in the instant case, the Court below undertook to make the necessary factual findings to support the order of the Board.

---

[19] We refer to the suggestion by the Court that the Board might have treated the petitioner's written counterproposal of November 22 as indicative of bad faith because [*inter alia*] it contained no provisions as to wages, grievance procedure or other major items. We submit that the record would not have supported such a finding on the part of the Board for there is no contention that this written proposal was conditioned or was understood to embody everything the Company had intended to put into the contract (R. 98). The Company's offer of a substantial wage increase was then still pending (R. 30) and also an offer dealing with wage inequities (R. 148-149, 330). It also submitted seniority proposals (R. 74, 98, 229), offered to incorporate its vacation plan into the contract (R. 129, 373) and told the Union it had no objection to its insurance plan and other existing practices, if agreed to, going into the contract (R. 187, 188). While this alternative finding was at first advanced by the Court as a suggestion, the Court subsequently adopted it as an established fact in its rationale for it refers to the failure of the Petitioner to advance "a single serious proposal". Hence, in making a substitute finding the Court not only assumed a function not entrusted to it by the statute but also misconstrued the record.

[20] *Hartsville Mills Co.* v. *N. L. R. B.*, 111 F (2d) 291, 293.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: September 23, 1953

APPENDIX

Pertinent excerpts from statute:

"Sec. 8 (a) It shall be an unfair labor practice for an employer—

• • • • • • • • • • •

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

• • • • • • • • • • •

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean

that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * * * * * * * * * *

"Sec. 10.

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have

jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U.S.C., Title 28, Secs. 346 and 347).

* * * * * * * * * *

Sec. 203.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or

other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

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276802—53

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 370

REED & PRINCE MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 447–463) is reported at 205 F. 2d 131. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 22–40, 1–21) are reported at 96 N. L. R. B. 850.

JURISDICTION

The decree of the court below (R. 464–466) was entered on June 9, 1953. On June 26, 1953, the court below denied petitioner's request for rehearing (R. 467–468). The petition for a writ

of certiorari was filed on September 23, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1), and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether substantial evidence considered on the record as a whole supports the National Labor Relations Board's finding that petitioner refused to bargain in good faith with the certified representative of its employees, and thereby violated Section 8 (a) (5) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151 *et seq.*), are set forth in the Appendix to the Petition, pp. 21–24.

STATEMENT

A. The contract negotiations between petitioner and the Union

On July 20, 1950, the Board certified the United Steelworkers, C. I. O. (the Union) as the representative of petitioner's production and maintenance employees (R. 451, 23; 43, 216–217).[1]

[1] The bargaining history at petitioner's plant starts in 1937, when the Union's predecessor, the Steel Workers Organizing Committee, attempted to negotiate a contract. Petitioner then engaged in varied unfair labor practices, including a failure to bargain in good faith. To remedy these unfair labor practices, the Board entered an order requiring petitioner, *inter alia*, to bargain with the Steel-

Thereupon, Union organizer Roy H. Stevens, Jr., contacted petitioner for the purpose of scheduling a bargaining conference, and was advised that vacation plans made petitioner's negotiating team unavailable until after Labor Day (R. 451, 4–5; 49–50). In the meantime, Stevens requested that the Union be permitted to post noncontroversial meeting notices on the company bulletin boards, and that he be furnished with certain information in the company's possession which was necessary to an intelligent discussion of wages and pensions. Permission to use the bulletin boards was denied, with leave to bring the matter up again when negotiations opened; the request for the data was ignored at this time. (R. 452, 4–5; 49–51, 217–218.)

The first bargaining session finally opened on September 15, 1950, and it was followed by twelve other meetings between the parties, the last occurring early in February, 1951.[2] At petitioner's

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workers, and this order was granted enforcement. *Reed & Prince Manufacturing Co.*, 12 N. L. R. B. 944, enforced as modified, 118 F. 2d 874 (C. A. 1), certiorari denied, 313 U. S. 595, adjudication in contempt, 130 F. 2d 765 (C. A. 1). In 1941, petitioner entered into a contract with the Steelworkers, and contractual relations continued until 1945, when they ceased upon submission of a dispute to the National War Labor Board. There is no evidence of union representation among petitioner's employees from 1945 to early 1950, at which time the Union filed a petition with the Board which led to its certification. (R. 3–4, 32.)

[2] At the first and all subsequent meetings, petitioner, over the Union's protest, had a stenotypist present to record the proceedings (R. 27–28; 51–52).

suggestion, the Union submitted a proposed contract, which, *inter alia,* provided for a wage increase, some form of union security, a check-off, a grievance procedure with arbitration as the ultimate resort, six paid holidays annually, seniority rules, and some form of insurance and pensions (R. 453; 221–228). By the end of the thirteen meetings, petitioner had definitively agreed to virtually nothing (R. 460, 33).[3] The pattern which it utilized to prevent the reaching of any agreement is illustrated by the course of the negotiations on the following subjects:

1. *Recognition clause.* In the second meeting of September 29, petitioner's negotiators suggested that—to the clause of the proposed contract which recognized the Union as the certified representative—there be added language equivalent to the first proviso of Section 9 (a) of the Act, respecting the right of individual employees to present grievances to management. The Union agreed to this amendment, but asked that the full language of the Act on this point be used, *i. e.,* to include the second proviso affording the bargaining representative an opportunity to be present at the adjustment of such individual grievances. Although this counter-proposal merely involved incorporating a statutory obliga-

[3] Petitioner had offered a 10-cent wage increase, but, as the Board found (R. 33) and the court below agreed (R. 460), this was "freely given by the [Company] in an inflationary period of rising wages."

tion in the very words of the statute, petitioner's negotiators at that time reserved judgment on the suggestion, and two months later, in effect, rejected it (R. 455–456, 28, 7; 60–61).[4]

2. *Wages and fringe benefits.* At the September 29 meeting, the Union indicated that it desired an increase of about 18 cents per hour in wage rates. Petitioner countered with an offer of 10 cents per hour, provided that there be no further discussion on the matter of a general wage increase. After consideration, the Union scaled down its demand to 15 cents per hour, and then, finding that petitioner remained firm on 10 cents, conceded that this increase might be acceptable when it learned the Company's position on the related factors of insurance, pensions and paid holidays. (R. 453, 8–9, 29; 64–65, 127–128, 132–133, 142–144, 149.)

Respecting paid holidays, petitioner rejected the Union's demand for six, referring to its current practice of giving year-end bonuses. However, when the Union then agreed to give up its holiday demand if the contract contained a specific provision covering the bonus, petitioner declined to commit itself in writing to its alleged practice.[5]

[4] Indeed, petitioner could not even agree to the introductory clause of the contract, which stated that the aim of the contracting parties was to "encourage the highest possible degree of friendly cooperative relations" (R. 60).

[5] There were also other examples of petitioner's refusal to incorporate its existing practice into the collective agreement. Although it allowed its employees "wash up" time

(R. 454, 9–10; 72–73, 93, 188.) As to pensions and insurance, petitioner, after listening to an exposition on the subjects by a union expert, first expressed the view that these areas were sufficiently covered by the social security system and Blue Cross, to both of which it contributed. Petitioner added, however, that it would consider the detailed written proposals on pensions and insurance which the Union had presented, and subsequently indicated that it had under consideration presenting an insurance plan of its own. But no such plan was ever submitted, nor was there any further discussion of the Union's proposals in the light of the alleged Company study. Instead, in the suggested contract which it introduced on November 22 (see *infra,* p. 8), petitioner simply omitted all reference to pensions and insurance. (R. 454–455, 10; 78–80, 92–93, 133–135, 141, 192, 236–244, 257–264, 265–267.) Thereafter, on December 5, petitioner, without consulting the Union or even mentioning it, proceeded to announce that wage rates were increased 10 cents per hour (R. 457–458, 30–31; 107–108, 272).

3. *Bulletin boards and job data.* At the opening meeting on September 15, 1950, the Union

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at the close of their shift, petitioner refused to agree to the Union's proposal that this allowance be placed in the contract (R. 101-102). Similarly, although petitioner in its employee's handbook established a leave of absence procedure, it would not allow this subject to be made a matter of contract (R. 456, 9–11; 73–76, 81).

repeated its requests for posting privileges on Company bulletin boards and for certain data on job classifications, wage rates, and employee ages (necessary to an intelligent discussion of the wage and pension issues). Petitioner denied the request for the bulletin boards on the ground that they were too crowded, but agreed to consider granting posting privileges on the plant gate. Despite the Union's regular inquiries at subsequent meetings, petitioner never gave it a final answer on this matter. (R. 455, 26–27; 56, 64, 87, 192.) As for the job information, which was first requested early in August and to which the Union was legally entitled, the material bearing on pensions was not furnished until the third meeting on October 12, and the material on wages was delivered in installments, commencing with the fifth meeting on October 31 (R. 452, 25–26, 7; 57–59, 86, 118–119, 230–233).

4. *Check-off and grievance procedure.* From the outset, petitioner flatly refused to discuss any procedure for a check-off of Union dues. It erroneously insisted that such subject was not within the area of compulsory bargaining. (R. 453–454, 31–32; 61–62, 119–120.)

On the proposed grievance procedure, petitioner took exception to the first step, which provided that an employee complaining to his foreman be accompanied by the steward, and to the last step, arbitration. The Union manifested a

willingness to yield on these matters if other terms of the contract were satisfactory, and then, in response to petitioner's request, submitted a more detailed proposal. This proposal, which had worked effectively at other plants, petitioner summarily rejected as too complex, without indicating any particulars in which it could be simplified. (R. 454; 62–64, 83–85, 91–92, 95, 98.)

Having thus forestalled agreement on the basis of the contract submitted by the Union, petitioner, on November 22, 1950, submitted a proposed contract of its own. This was a brief, two-page document containing a recognition clause (which still omitted the second proviso to Section 9 (a)), and a provision as to hours of work. However, it had no provisions on wages, grievance procedure, pensions, insurance, or the other major items which had been discussed with the Union for the past two months. (R. 461; 99–103, 265–267.)

After several futile attempts to bargain on the basis of this contract, as well as continuing efforts to reach agreement on its proposed contract, the Union concluded that petitioner was not acting in good faith, and, on January 2, 1951, called the employees out on strike (R. 458; 111). On March 2, 1951, the strike still being in effect, petitioner sent a letter to each of the strikers, advising them that they would be replaced if they did not return to work. To facilitate this return to work movement, petitioner made avail-

able a company car for the purpose of transporting across the picket line those who had decided to abandon the strike. Donald Pierce, to whom was entrusted the car for this purpose, advised a striking employee that he had better come back to work because petitioner "is never going to sign a contract with the Union"; it "would rather sell the plant than sign a contract with the Union." (R. 459, 15, 35; 154, 272–273.)

B. The conclusions of the Board and the court below

The Board concluded that "the record, taken as a whole, demonstrates a lack of good faith bargaining on [petitioner's] part," and that petitioner had thereby violated Section 8 (a) (5) of the Act (R. 32, 35). Although particularizing five factors especially relied on (R. 33–34),[6] the Board made clear that its ultimate conclusion rested on the "entire bargaining pattern of the [petitioner] . . . viewed in its totality," including petitioner's "unsavory labor relations history," its "over-all attitude and position," and the admission of its agent Pierce in the course of the back-

[6] These were: "(1) the delay in scheduling the first meeting and in furnishing the wage and pension data; (2) the insistence upon the presence of a stenotypist at the bargaining sessions; (3) the unreasonable withholding of acquiescence on admittedly trivial matters, such as notice posting facilities and the recognition clause; (4) the hasty institution of the wage increase after the negotiations had broken down, without notifying the Union or in any way permitting the Union to share in the credit for the increase; and (5) the handling of the check-off issue."

to-work movement (R. 32, 33, 35). The Board accordingly entered an order remedying the unfair labor practices found, which required petitioner, *inter alia,* to bargain collectively with the Union (R. 36–38).

The court below, after "an attentive examination of the entire record of the bargaining negotiations herein," concluded that: "we are definitely of the opinion that this is a case in which, under the standard laid down in *Universal Camera Corp.* v. *National Labor Relations Board* [340 U. S. 474], we should accept the ultimate finding of the Board that [petitioner] did not participate in the bargaining negotiations with the good faith required of it by law" (R. 451). The court therefore entered a decree enforcing the Board's order in full (R. 464–466).

ARGUMENT

1. The decision of the court below that petitioner refused to bargain in good faith presents no issue warranting review by this Court. As was emphasized in *National Labor Relations Board* v. *American National Insurance Co.,* 343 U. S. 395, 410, "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." Accordingly, the conclusion of the court below that this standard was not satisfied here raises only a question of substantial evidence, which in turn is governed by the rule that "this Court 'is not the place

to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.' *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503 (1951)" (*Ibid.*).

2. Without merit is petitioner's contention (Pet. 11–17) that the court below misapplied the principles of Section 8 (d) of the Act by finding "at least some evidence of bad faith, . . . of a desire not to reach an agreement" in petitioner's failure to make "a single serious proposal meeting the union at least partway" (R. 451). This contention rests on the erroneous premise that, to test the *bona fides* of an employer's negotiations by such indices as "the reasonableness of the positions taken" (R. 450) and the character of his *counter-proposals,* is in effect to force him to make *concessions.* Congress rejected such an assumption when, in amending the Act, it decided to continue measuring the bargaining obligation by the good faith standard.

As this Court pointed out in *American National Insurance,* the bargaining obligation imposed by the Wagner Act required an employer "'to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement'" (343 U. S. at 402–403). In 1947, "the Hartley Bill, passed by the House, eliminated the good

faith test and expressly provided that the duty to bargain collectively did not require submission of counterproposals." But, as "amended in the Senate and passed as the Taft-Hartley Act, *the good faith test of bargaining was retained and written into Section 8 (d)*." (*Id.* at 404, emphasis added.) In so doing, Congress, although specifying that the the bargaining obligation did not require making a "concession," deliberately selected this term "in place of 'counterproposal' at the suggestion of the Chairman of the Board that the statutory definition of collective bargaining should conform to the meaning of good faith bargaining as understood at the passage of the Wagner Act" (*Id.* at 404, n. 14).[7] "Thus it is now apparent from the statute itself that the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position" (*Id.* at 404).

Consequently—by declining "to be blinded by empty talk and by the mere surface motions of collective bargaining" (R. 450), and looking to

[7] The testimony of then Chairman Herzog on this point is found at R. 480–484. In essence, he emphasized that: "A counterproposal and a concession are vastly different things; wholly valid counterproposals may merely state existing conditions. The failure to make a counterproposal (as distinguished from a concession) may be evidence of bad faith—that is, of an intent under no circumstances to reach agreement. . . . [But] we have found in many cases that an employer has bargained in good faith even though he made no counterproposals . . ." (R. 483).

see whether petitioner made "*some* reasonable effort in *some* direction to compose his differences with the Union" (R. 451)—the court below merely applied the good faith test incorporated in Section 8 (d). On the other hand, by making irrelevant the *quality* of an employer's proposals (Pet. 12), petitioner would substitute for good faith the purely mechanical test of whether the parties met and conferred, the test of the Hartley Bill which Congress rejected.

3. Since the court below thus correctly applied the good faith standard of Section 8 (d), the different results in the decisions cited by petitioner (Pet. 16–18) are attributable merely to "the circumstances and the particular facts of the particular case" (*Majure* v. *National Labor Relations Board,* 198 F. 2d 735, 739 (C. A. 5)). There is thus no conflict between these cases and the instant one which would warrant review by this Court.

4. Nor is any ground for review presented by petitioner's contention (Pet. 18–20) that the court below, in support of its decision, relied on matters not passed on by the Board. As stated in *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241, 247: "We do not stop to consider these contentions, since, without such findings, there would still be a basis in the record for the Board's conclusions." In any event, where, as here, the additional facts alluded to by the court are revealed by the record,

are not in dispute, and merely support the Board's ultimate conclusion, a remand to the Board was unnecessary. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416, 428, 431.

CONCLUSION

There is no conflict of decisions and the petition presents no substantial question warranting review. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Respondent.

Reply Brief of Petitioner to Brief in Opposition

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Reply Brief of Petitioner to Brief in Opposition

This reply brief is submitted in accordance with Rule 38(4)(a) in order to draw the attention of the Court to what Petitioner regards as a glaring inconsistency between the position the National Labor Relations Board has adopted in this Court and its position with respect to the case at the time it issued its decision (R. 22-40) on the Exceptions taken by Petitioner to the Trial Examiner's Report (R. 11, 21).

STATEMENT

As its principal argument for urging this Court to deny a writ of certiorari the Board contends (Resp. Br. 10) that the only issue in the case is "a question of substantial evidence," or in other words, that the case turns on a question of fact rather than of law.

To lay a foundation for this argument counsel for the Board have engaged in a most unusual procedure. Apparently regarding the Board's findings of fact as too thin

to supports its ultimate conclusion and Order, the authors of the opposition brief have presented a version of the bargaining conferences which in many respects is not only at variance with the findings of the Board but repeats many of the factual errors in the Intermediate Report which the Board noted "inaccurately reflects the record in certain material respects" (R. 24), and thus made it necessary for the Board "to reappraise the factual background."

For example, in the opposition brief it is stated (Resp. Br. 7): "From the outset Petitioner flatly refused to discuss any procedure for a checkoff of union dues." The Board made no such finding. It did note with disapproval that the Company had taken the position that it was under no legal obligation to bargain on the subject of checkoff, but conceded that "Respondent proceeded to give the Union reasons why it would not grant a checkoff provision even if it were a bargainable issue" (R. 31).

An even more inaccurate picture of the Board's findings is the account of the bargaining on "wages and fringe benefits" contained in the "Statement" (Resp. Br. 5, 6). In essence the brief adopts the Trial Examiner's version of what had occurred with respect to the negotiations on wages, holidays, pensions and insurance (R. 8, 9, 10).

The Board, however, repudiated the Trial Examiner's findings on these subjects and concluded: "We find below that Respondent rejected, as it had a right to do, pension and insurance and paid holiday demands of the Union * * *. Accordingly, we do not, as did the Trial Examiner, in any way base our judicial conclusion of bad faith bargaining on the conditional nature of Respondent's wage offer * * * (R. 29). Finally, we do not think that the record supports the Trial Examiner's finding that Respondent failed to give the Union a definite answer on pensions and insurance, seniority, or the grievance procedure, and we base no part of our findings on these factors" (R. 34).[1]

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[1] It should be noted that despite the Board's reversal of the Trial Examiner's finding on the grievance procedure issue (R. 34) and its dis-

Other instances of depicting as established facts alleged incidents, upon which there were conflicts of evidence and with respect to which the Board made no finding are found in the footnotes to the "Statement" (Resp. Br. 5, n. 4, 5). Indeed, even in describing incidents upon which the Board made a finding adverse to Petitioner, the authors of the brief seem unable to summarize the Board's findings fairly. Thus, in criticizing the Company for its "delay" in supplying certain statistical information, the Board said: "It is clear that the wage data was not given to the Union before October 7 and might not have been furnished until the October 31 meeting" (R. 26). According to the brief, however, "the material bearing on pensions was not furnished until the third meeting on October 12, and the material on wages was delivered in installments, commencing with the fifth meeting on October 31" (Resp. Br. 7).[2]

Apparently as an excuse for presenting to this Court matters on which the Board refused to base any part of its ultimate conclusions, the authors of the brief quote out of context the Board's conclusion that "the record taken as a whole demonstrates a lack of good faith bargaining" (Resp. Br. 9), and imply that this conclusion did not rest entirely on the factors particularized in the Board's opinion.

This is a misrepresentation, we submit, of the grounds upon which the Board decision rested, for the majority opinion was at pains to state: "As noted above, however, we believe that the specific factors relied upon amply support our finding that the Respondent has failed to exhibit

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claimer that it was basing any part of its findings thereon, the opposition brief relies heavily on its version of the way this issue was dealt with in the negotiations. In asserting that the Union proposal had been "summarily rejected as too complex, without indicating any particulars which could be simplified" (Resp. Br. 8), the brief states as a fact an allegation of the principal union witness, later substantially retracted by him on cross examination (R. 122, 131).

[2] In this respect the authors of the brief ignore the admissions of the principal complaining witness who conceded on cross examination that he might have received the pension data on September 29, the date of the second bargaining conference (R. 307-308), and positively fixed October 20 as the date he received the bulk of the wage information (R. 82).

that degree of good faith which the Act requires with respect to the obligation to bargain collectively" (R. 34).

The partial quotation from the sentence in the Board's opinion dealing with "the entire bargaining pattern," is illustrative of the kind of distortions with which the Board's brief is studded. The complete sentence reads: "Although no one of the separate elements in this case is in itself conclusive evidence of bad faith bargaining, when the entire bargaining pattern of the Respondent is viewed in its totality and the individual items are appraised together, the picture is clear."

If the sentence had been correctly quoted it would have been obvious that by the "entire bargaining pattern" the Board was alluding to the "totality" of the individual items it had previously summarized.

CONCLUSION

In drawing the attention of the Court to these matters Petitioner has no desire to quibble over irrelevant points or to urge the correction of minor errors of little consequence. It is obvious, however, that if a litigant is alleging, contrary to the view urged by the other party that the question presented to the Court is purely a factual one, it behooves him to state with scrupulous fairness the facts upon which he is relying. This is particularly true when that litigant is an administrative agency whose findings have been recognized by this Court as carrying "the authority of an expertness which Courts do not possess and therefore must respect." *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 488 (1951). It is a strange paradox for such an agency to urge in this Court a version of the facts which the fact-finders themselves refused to adopt as the basis for the very order assailed on judicial review.

It is our position that the validity of the Board's Order and the decision of the Court below must stand or fall upon the "elements" or subsidiary findings of fact and law upon

which the Board expressly rested its decision. We think it is clear from the opinion of the Court below and from the implications of the opposition brief itself that the decision of the Board cannot be supported on such grounds, and that the Court below then was without power [3] to enforce the Board Order by relying on matters not passed on by the Board itself. This is particularly true where the additional facts "alluded to by the Court" are very much in dispute, contrary to what the Board brief now asserts.

We earnestly submit, therefore, that the case turns upon the question of law described on p. 2 of Petitioner's brief, that this question was decided erroneously, and is of sufficient importance to warrant review by this Court.

Respectfully submitted,

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JULIUS KIRLE,
Counsel for Petitioners.

REILLY, RHETTS & RUCKELSHAUS,
1120 Tower Building,
Washington 5, D. C.,
Of Counsel.

Dated: November 10, 1953.

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[3] *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 94-95, (Pet. Br. 19). The *Newport News* case (308 U. S. 241, 247) relied upon by the Board and the Court below for supporting a contrary position (Resp. Br. 13), is not in point, for in that case sufficient findings of the Board remained, after other findings had been disapproved, to support the Board Order. Moreover, in the instant case there is no basis for the blithe assumption that the "additional facts alluded to by the Court" are revealed by the record [and] are not in dispute." (Resp. Br. 13-14.)

[fol. 1b] IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

REED & PRINCE MANUFACTURING COMPANY, Respondent

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—Filed May 2, 1952

To the Honorable, the Judges of the United States Court of Appeals for the First Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, *et seq.*), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, Reed & Prince Manufacturing Company, Worcester, Massachusetts, its officers, agents, successors, and assigns. The proceedings resulting in said order are known upon the records of the Board as "In the Matter of Reed & Prince Manufacturing Company Employer and United Steelworkers of America, CIO Petitioner, Case No. 1-RC-1471", and "In the Matter of Reed & Prince Manfacturing Company and United Steelworkers of America, CIO, Case No. 1-CA-865".

In support of this petition the Board respectfully shows:

(1) Respondent is a Massachusetts corporation, engaged in business in the State of Massachusetts, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon all proceedings had in said matter before the Board as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on October 16, 1951, duly stated its findings of fact and conclusions of law, and issued an order directed to the Respondent, its officers,

[fol. 1c] agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in this case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that Respondent, Reed & Prince Manufacturing Company, Worcester, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steelworkers of America, CIO, as the exclusive representative of all production and maintenance employees of the Respondent at its Worcester, Massachusetts, plant, including shipping and receiving room employees and inspectors, but excluding office employees, departmental clerks, executives, foremen, assistant foremen, draftsmen, professional employees, guards, and all supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, or other conditions of employment.

(b) Soliciting employees who went on strike on January 2, 1951, to abandon their concerted activities, by threats of reprisal, by promises of benefit, or by any other means circumventing the Union as the exclusive bargaining representative of such employees.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in collective bargaining or other mutual aid or protection, or to refrain from any of all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as guaranteed in Section 7 thereof.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Steelworkers of America, CIO, as the exclusive representative of all the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Mail to each of its employees to whom the March 2, 1951, letter was sent, and post at its plant in Worcester, Massachusetts, copies of the notice attached hereto as Appendix A. Copies of such notice, to be furnished by the Regional Director for the First Region, shall, after being duly signed by the Respondent's authorized representative, be posted and mailed by the Respondent immediately upon receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[fol. 1d] (c) Notify the Regional Director for the First Region, in writing within ten (10) days from the date of this Order, what steps the Respondent has taken in compliance herewith.

(3) In the event that the Board's Order, heretofore set forth, is enforced by a decree of this Court, it is hereby further respectfully requested that the notice attached hereto and made a part hereof shall be amended by deleting therefrom the words "A Decision and Order", and there shall be inserted in their stead the words, "A Decree of the United States Court of Appeals Enforcing an Order."

(4) On October 16, 1951, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's counsel.

(5) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceedings before the Board, including the pleadings, testi-

mony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

National Labor Relations Board, by (S.) A. Norman Somers, Assistant General Counsel.

Dated at Washington, D. C., this 29th day of April, 1952.

[fol. 1e] APPENDIX A

Notice to All Employees

Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not, by threats of reprisal, promises of benefit, or any other means, solicit employees who went on strike on January 2, 1951, to abandon their concerted activities.

We will not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, C.I.O., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organiza-

tion as authorized in Section 8 (a) (3) of the Act. All our employees are free to become or remain members of this union, or any other labor organization.

We will bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, we will embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees in our Worcester, Massachusetts, plant, including shipping and receiving room employees and inspectors, but excluding office employees, departmental clerks, executives, foremen, assistant foremen, draftsmen, professional employees, guards, and all supervisors as defined in the Act.

Reed & Prince Manufacturing Company (Employer). By (Representative) (Title).

Dated —— ——.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[fol. 442] On the same day, May 2, 1952, the said National Labor Relations Board also filed a transcript of record.

Thereafter, to wit, on May 5, 1952, an order was entered granting the motion for leave to proceed on record appendices under Rule 24 of this Court.

Thereafter, to wit, on June 12, 1952, the following record appendix to brief for petitioner was filed:

United States Court of Appeals

For the First Circuit

OCTOBER TERM, 1952.

No. 4647.

NATIONAL LABOR RELATIONS BOARD,

PETITIONER,

v.

REED & PRINCE MANUFACTURING CO.,

RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

[96 N.L.R.B. 850.]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Marcel Mallet-Prevost, Attorney, with whom *George J. Bott*, General Counsel, *David P. Findling*, Associate General Counsel, *A. Norman Somers*, Assistant General Counsel, and *Marshall J. Seidman*, Attorney, were on brief, for petitioner.

Gerard D. Reilly, with whom *Julius Kirle* and *Reilly, Rhetts & Ruckelshaus* were on brief, for respondent.

OPINION OF THE COURT.

June 9, 1953.

MAGRUDER, *Chief Judge*. In the petition now before us, the National Labor Relations Board asks us to enforce a Board order entered October 16, 1951, directing Reed & Prince Manufacturing Co., upon request, to bargain collectively with United Steelworkers of America, CIO, as the exclusive representative of all the production and main-

tenance employees of respondent at its plant at Worcester, Massachusetts. An earlier phase of this case is reported in *NLRB* v. *Reed & Prince Mfg. Co.*, 196 F.2d 755 (C.A. 1st, 1952).

Because the Union on certain dates was out of compliance with the filing requirements of § 9(h) of the National Labor Relations Act, as amended (61 Stat. 146)—the non-Communist affidavit provisions—respondent raised certain technical objections which, if well taken, would prevent our reaching the merits of the case. We say "technical", because, as we noted in *NLRB* v. *Kobritz*, 201 F.2d 156, 157 (C.A. 1st, 1953), "it not infrequently happens that a union completely above suspicion of Communist domination may fall temporarily out of compliance where, for example, a union officer dies or goes out of office and a brief delay occurs before his successor files the necessary affidavit." See also *NLRB* v. *Dant & Russell, Ltd.*, 344 U.S. 375, 383-84 (1953).

The objection that the Board was without authority to issue the complaint in this case, because Local 1315 of the Union was temporarily out of compliance with § 9(h) on the date the original charge was filed, is authoritatively answered by *NLRB* v. *Dant & Russell, Ltd.*, *supra*.

Respondent further contends that it was under no statutory duty to bargain with the certified Union because at the time the bargaining was initially requested, and for some months thereafter, Local 1315 had not complied with the filing requirements of § 9(h) of the Act. This objection was not taken at any time during the period of protracted negotiations between the Company and the Union; the Union's temporary noncompliance obviously had no bearing upon the issue of the Company's good faith in the conduct of the bargaining negotiations. The objection was distinctly an afterthought, raised for the first time

in the Company's exceptions to the trial examiner's Intermediate Report. The short answer is that Congress has not made compliance with the filing requirements of § 9(f), (g) and (h) a condition precedent to the obligation of an employer under § 8(a)(5) to bargain collectively with the chosen representative of the employees; such compliance is merely made a condition precedent to invoking the machinery of the Act for the investigation of a question concerning representation, or for the issuance of a complaint charging the commission of unfair labor practices. It was so held in *West Texas Utilities Co.* v. *NLRB*, 184 F.2d 233, 239 (App. D.C. 1950), cert. denied 341 U.S. 939 (1951). There was a contrary holding in *NLRB* v. *Tennessee Egg Co.*, 199 F.2d 95 (C.A. 6th, 1952). But the judgment in the latter case has since been reversed and vacated by the court of appeals for the Sixth Circuit, 201 F.2d 370 (1953), in deference to the reasoning, if not to the holding, of the Supreme Court in *NLRB* v. *Dant & Russell, Ltd.*, 344 U.S. 375 (1953).

Coming then to the merits, this is not a simple case where the employer has made a clear refusal to recognize or bargain with the certified representative of its employees. Rather, it is one where the employer engaged in a lengthy series of bargaining conferences, which got nowhere. In such a case the question is whether it is to be inferred from the totality of the employer's conduct that it went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible, or that it bargained in good faith but was unable to arrive at an acceptable agreement with the union. Particularly in this area of mixed fact and law, a court will not lightly disregard the over-all appraisal of the situation by the Labor Board "as one of those agencies presumably equipped or informed by experience to deal with a specialized field of

knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951).

Section 8(a)(5) of the Act (61 Stat. 141) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees". Correspondingly, § 8(b)(3) makes it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees". More or less declaratory of the law as it had been expounded in judicial decisions under the original Act, § 8(d) of the Act, as amended, provides that for the purposes of this section "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession".

It is true, as stated in *NLRB* v. *American National Ins. Co.*, 343 U.S. 395, 404 (1952), that the Board may not "sit in judgment upon the substantive terms of collective bargaining agreements." But at the same time it seems clear that if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations. See *Wilson & Co., Inc.* v. *NLRB*, 115 F.2d 759, 763 (C.A. 8th, 1940). See also Smith, The Evolution

of the "Duty to Bargain" Concept in American Law, 39 Mich. L. Rev. 1065, 1108 (1941). Thus if an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the union at least partway, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union. In other words, while the Board cannot force an employer to make a "concession" on any specific issue or to adopt any particular position, the employer is obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if § 8(a)(5) is to be read as imposing any substantial obligation at all.

After an attentive examination of the entire record of the bargaining negotiations herein, we are definitely of the opinion that this is a case in which, under the standard laid down in *Universal Camera Corp.* v. *NLRB*, *supra*, we should accept the ultimate finding of the Board that respondent did not participate in the bargaining negotiations with the good faith required of it by law.

As the outcome of a representation proceeding and a subsequent election held on July 12, 1950, the Board on July 20, 1950, certified United Steelworkers of America, CIO, as the exclusive bargaining representative of certain of respondent's employees. There was no dispute at that time, nor is there now, as to the appropriateness of the designated bargaining unit. On or about August 1 following, the chief negotiator for the Union called upon respondent's president with the request for a bargaining conference as soon as convenient. He was informed by the president that because of other commitments no definite date could be set at that time. On or about August 9 the

Company sent word to the Union that it would be impossible to arrange a meeting before Labor Day in view of the fact that various members of the Company's negotiating committee were on vacation until that time. After Labor Day it was finally agreed that the initial bargaining session would be held on September 15. In its decision the Board questioned "whether the Respondent would have delayed, for such a relatively long period of time, negotiations for a business contract or a bank loan it was desirous of concluding." The Board went on to say that although "the Respondent's conduct in this respect, standing alone, might be deemed equivocal, appraising it in the context of the Respondent's whole course of conduct we conclude that it was another aspect of the Respondent's calculated effort to avoid reaching an agreement with the Union while preserving the appearance of bargaining."

Meanwhile, on or about August 9, the Union by telephone requested permission to post certain non-controversial notices on the Company bulletin boards. It was told that this request could not be granted at that time but that the matter should be brought up at the first meeting. By letter of August 9 the Union requested respondent to furnish it with wage rates and classifications and the age and length of service of all employees in the bargaining unit, "In order to enable the United Steelworkers of America to bargain intelligently" with the Company. Although the Union made several further requests for this data, the Company did not supply it in full until some time in October. Commenting upon this, the Board observed that "the Respondent's delay in supplying the requested data may be viewed legitimately as a significant part of its entire course of conduct in determining whether or not the Respondent has exercised good faith in its bargaining negotiations with the Union."

On September 15 the first meeting took place as scheduled. Apparently the Union wanted to begin the discussions on a broad base, exploring potential areas of agreement and disagreement. The Company, however, insisted that the Union submit a written list of its contract proposals, which the Union immediately did.

Subsequently there were twelve further meetings between the parties running from the beginning of October through early in February, 1951. The first five of these conferences were devoted to a discussion of the suggested contract submitted by the Union. The principal Union proposals were (1) a substantial wage increase; (2) some form of union security, either a union shop or a maintenance of membership clause as an alternative; (3) a check-off provision; (4) a grievance procedure with arbitration as the ultimate resort; (5) six paid holidays annually; (6) a seniority provision, and (7) some form of insurance and pensions.

With respect to the matter of wages, the Company offered a general wage increase of ten cents per hour, with the express condition that if the offer were accepted there would be no further negotiations on this subject. The Union, having originally requested fifteen cents, or maybe more, was unwilling to accept the offer on these terms; however, it repeatedly stated that it would regard all the various economic benefits as a single "package", and hence might be able to agree to the ten-cent increase, once the Company's position was made known on certain other demands, *e.g.*, pensions, insurance, and paid holidays.

The Company announced its general opposition on principle to any form of union security and to arbitration.

On the check-off proposal, the Company registered its opposition, mainly on the ground that this was not a proper subject of collective bargaining. In this the Company was

mistaken. The Company added that in any event it could not accept a check-off provision because its administration would be too much of a bookkeeping burden. As the Board observed, an employer who takes the erroneous position that a particular subject matter is not bargainable "can hardly approach the discussion of this subject with an open mind and a willingness to reach an agreement."

As to the proposed grievance procedure, the Company took exception to the first step, providing that an employee complaining to his foreman be accompanied by the steward, and to the ultimate provision for arbitration. The Union manifested some willingness to yield on these matters, provided the other terms of the contract could be worked out. But when in response to the Company's request the Union submitted a more detailed proposal with reference to grievance procedure, the Company objected that this was too "complex". Apparently it did not point out any particulars in which the proposal might be simplified, though the Union claimed that it had submitted a typical grievance clause which worked effectively at other plants.

The Company also rejected the Union's demand for six paid holidays, referring to its current practice of giving year-end bonuses. When the Union urged the Company as an alternative to commit itself in the contract to a continuance of this practice, the Company declined.

The seniority proposal submitted by the Union was found by the Company to be unacceptable in various items, for instance, in the provision allowing seniority to accumulate during absences not exceeding two years on account of lay-offs or disability. Subsequently the Company submitted its own seniority proposal, which was culled from the 1941 contract negotiated between respondent and the labor organization then representing its employees.

Finally, as to pensions and insurance, the Company lis-

tened to an exposition by a union expert, but expressed the view that these areas were sufficiently covered by Social Security and Blue Cross, to both of which the Company contributed. It added, however, that it would consider the Union proposals and would offer some of its own, which so far as we can discover the Company never did. The Union submitted certain fairly detailed written proposals on the subject of pensions and insurance; but respondent's vice president, testifying before the trial examiner, conceded on cross-examination that the Company's final position on insurance and pensions was never communicated to the Union.

In addition to the foregoing major issues, there were several lesser items brought into the discussion:

(1) At the first meeting the Union again raised the question of bulletin board space. The Company replied that while it could not comply with this request, it might be able to arrange for posting of Union notices on plant gates. Despite repeated requests by the Union, the Company never took definite action in this matter. The Board observed that the granting of such posting permission is a common industrial practice, and expressed the opinion "that the Respondent's handling of the bulletin board matter, taken in the context of this case, indicates the Respondent's basic unwillingness to accept the principle of collective bargaining and further strengthens our conclusion that the Respondent has not bargained in good faith."

(2) At the end of the recognition clause proposed by the Union, the Company wanted to insert the first proviso of § 9(a) of the statute, recognizing the right of individual employees to present grievances directly to the employer. The Union agreed to this on the condition that there also be inserted in the recognition clause the second proviso in § 9(a), "That the bargaining representative has been given

opportunity to be present at such adjustment." The Company took this countersuggestion under advisement, but presumably ultimately rejected it, since the recognition clause in the proposed contract which the Company submitted to the Union on November 22 contained only the first proviso of § 9(a). On this matter the Board stated: "We cannot conceive of a good faith basis for a refusal to incorporate a statutory obligation into a contract in the very words of the statute. This type of quibbling conduct is consistent only with the conclusion that there was bad, not good, faith bargaining."

(3) The Union suggested a 40-hour workweek with time and one-half on Saturday. The Company was unwilling to accept the latter point, feeling that time and one-half should begin only after an employee had already worked 40 hours during the week. Subsequently the Union came up with a modified proposal to the effect that employees who, in following management schedules, were required to work on Saturday should be paid time and a half, but that time and a half would not apply where an employee had to work on Saturday because he had lost time for personal reasons during the regular workweek. The modified proposal, however, was not accepted by the Company.

(4) Another provision in the proposed Union contract related to leaves of absence to be granted to employees "with the consent of the Union and the Company." The Company squelched this proposal on the ground that it was not its practice to grant such leaves of absence. However, at the hearing before the trial examiner the Board introduced in evidence a Company "Book of Information for Employees" which included this sentence: "This [section relating to employee service credits] does not apply to cases where the Management has granted in writing permission for Leave of Absence."

(5) During the course of the negotiations the Union pointed out that at present employees who were on a piecework basis received insufficient information to compute their incentive pay. The Union requested the Company so far as possible to supply each employee with a daily record of what he had done on that particular day similar to a method being used by other companies. Respondent rejected this suggestion, claiming that it was impossible for it to make these computations.

By October 31, since no agreement had been reached on even the most minor matters, both sides seemed to feel that the negotiations were at an impasse. Nevertheless, there were seven further meetings. On or about November 10 the Union submitted a final proposed contract which was complete except for a wage clause. On November 22 the Company, in turn, submitted its first and only proposed "contract", to which we shall make further reference subsequently. Neither of these documents served to bring the parties any closer to an agreement.

On December 4 respondent announced to its employees that a Christmas bonus would be paid to them "in recognition of their loyalty during the past year", with the expression of hope "that we shall be able to continue the payment for many years to come." On December 5 respondent posted a notice stating: "Based on certain decisions of the National Labor Relations Board, the Management is now permitted to put into effect immediately the 10¢ an hour increase previously offered to the factory employees in the National Labor Relations Board bargaining unit." This notice the Board regarded as another aspect of respondent's "lack of good faith in the bargaining negotiations with the Union." The Board also went on to add: "[We have] frequently had occasion to point out that the unilateral granting of a wage increase during

the course of negotiations with the legally constituted bargaining representative . . . is a violation of the Act. Such action necessarily has the effect of undermining the representative status and prestige of the bargaining agent." While it was recognized that such a unilaterally announced wage increase might legally be made effective once the parties had reached, as a result of good faith bargaining, an impasse in the bargaining negotiations, it was the Board's view that the responsibility for the impasse here must be attributed to respondent's lack of good faith in the prior negotiations with the Union. It further found that "Respondent emphasized this bad faith by announcing the wage increase in such a way that the Union could not and did not in any way share the credit for it."

In the meantime the Union was becoming increasingly disturbed over what it called "the Company's bad faith" and the consequently decreasing likelihood of ever arriving at an agreement. On or about November 14 the Union reported to its membership that the Company was strongly against all the "basic provisions" suggested by the Union and that it appeared "that the Company is just stalling." Shortly thereafter the employees authorized a strike. At the December 27 meeting the Union advised the Company that there would be a strike at the plant effective January 2 "because they were not bargaining in good faith with the union". This strike was called, and was still in progress at the time of the hearing before the trial examiner.

Subsequently the federal and the Massachusetts conciliation services—which had come to play an active part in the negotiations—made several further, but unsuccessful, efforts to get the parties together. The Company told the conciliators that the parties were still bargaining and that it thought more progress could be made by direct negotiations between the Union and the Company, even

though at the same time the Company admitted, as indeed it had to in order to sustain the validity of its unilateral announcement on December 5 of a wage increase, that the parties had reached an impasse. The conciliators suggested arbitration of the principal issues of disagreement, which proposal was accepted by the Union but not replied to by the Company. They also proposed various compromises, which the Company refused.

Shortly after the beginning of the strike, the Company initiated several back-to-work efforts. In this it was aided by one Donald Pierce, a Company stock expediter, who was entrusted with a Company car to furnish transportation to returning strikers. One employee testified that Pierce urged him to return to work "because Alden Reed [respondent's treasurer] is never going to sign a contract with the union" and told him that respondent "would rather sell the plant than sign a contract with the union." The admission of this testimony was strenuously objected to by respondent, but since Pierce was acting for the Company in these back-to-work activities, it seems clear that on ordinary agency principles the testimony as to Pierce's remark, which was uncontradicted, was properly let in as an admission by the Company.

Before us, respondent has sought to ascribe the undoubted stalemate to an adamant insistence by the Union upon acceptance of the basic provisions of its standard contract, submitted on a take-it-or-leave-it basis. As evidence of this, respondent relies upon certain expressions in a leaflet circulated by the Union negotiating committee to the employees, purporting to describe the bargaining meeting of November 14. But an examination of the record of the lengthy negotiations between the Company and the Union indicates that the Union's bargaining efforts were marked by a considerable flexibility of approach, for the

Union negotiator at many important points submitted modifications of its proposals in an effort to meet Company objections. It even appears that the Union might have been willing to accept a contract with no union security provision or arbitration clause in it if the other provisions could have been worked out acceptably.

The plain fact is that after months of negotiations, as the Board observed, "practically all the Union could report to its membership in the way of progress was the 10-cent wage offer—freely given by the Respondent in an inflationary period of rising wages." Even in minor matters, such as the Union's request for use of the Company bulletin board, and the Union's request that the second proviso of § 9(a) of the Act be inserted in the recognition clause, the Company withheld assent. The Company's asserted justification for this is that it was "bargaining technique". But it may be wondered how the Company could in good faith ever expect to arrive at an agreement if the major proposals submitted by the Union are refused on principle and assent on the minor ones is withheld as a matter of bargaining technique.

In sustaining the Board's ultimate conclusion of lack of good faith, as deduced from the record as a whole and from the totality of respondent's conduct in its bargaining relations with the Union, we do not necessarily have to sustain the Board on each and every one of its subsidiary findings of fact. As stated in *NLRB* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 247 (1939): "We do not stop to consider these contentions, since, without such findings, there would still be a basis in the record for the Board's conclusions." As a matter of fact most of the underlying facts, certainly the more significant ones, are not in dispute.

Nor do we have to agree with the Board as to each and every one of the incidents which it specially emphasized

in its decision as indicating a lack of good faith on the Company's part in the conduct of the bargaining negotiations. For instance, we are not inclined to agree with the Board that the Company's insistence, over the Union's strenuous objection, on having a stenotypist present at all the bargaining meetings to take down a verbatim transcript of the proceedings was evidence of the Company's bad faith. On the other hand, we think that the Board might well have lifted out from the record another item for special comment, as indicative of bad faith on the Company's part. We refer to the fact that, after discussion at several meetings of the Union's various proposals of items to be included in the contract, the Company on November 22 submitted its own proposal of a so-called contract. This was a brief two-page document containing a recognition clause which paraphrased the first proviso of § 9(a) of the Act but made no reference to the second proviso, and contained a provision as to hours of work substantially copied from its 1941 agreement, but had no provisions as to wages, grievance procedure, or the other major items which the Union had proposed for inclusion in the contract. It is difficult to believe that the Company with a straight face and in good faith could have supposed that this proposal had the slightest chance of acceptance by a self-respecting union, or even that it might advance the negotiations by affording a basis of discussion; rather, it looks more like a stalling tactic by a party bent upon maintaining the pretense of bargaining.

There may be cases where the ultimate finding of an administrative agency rests in part upon findings of subsidiary fact, or inferences therefrom, which a reviewing court deems insupportable, and where, because the court is in substantial doubt whether the administrative agency would have made the same ultimate finding with the erro-

neous findings or inferences removed from the picture, it may be appropriate for the court to remand the case to the administrative agency for further consideration. But in view of the record in its entirety, we are satisfied that this is not such a case.

After reviewing the facts and stating its conclusion on the record as a whole, the Board in its decision had this to say: "We have scrupulously avoided prejudging the Respondent because of its rather unsavory labor relations history, but the Board is not required by law to ignore this history. Accordingly, in evaluating the evidence in this case, we have given some weight to this factor." Respondent contends that the Board committed a glaring error in taking account of this factor and that for this reason the Board order should be set aside. We do not think it would be error, in a case like this, for the Board to take account of the prior history of the Company's labor relations, as disclosed in the prior record of which the Board might take judicial notice. The ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence. It is similar to the inquiry whether an employer discharged an employee for union activity, or for some other reason, where the prior history of the employer's labor relations, whether good or bad, may be relevant. However, we do not stop to consider the contention at length, for in this case it is evident that the Board's reference to this factor was only as a makeweight, in support of a conclusion which the Board deemed inescapable from the present record—and a very light makeweight at that, for the Board went on to say that it was "not unmindful of the fact that from 1941 to 1945, as a result of the Court decree, the Respondent had contractual relations with the Union."

Finally, respondent contends that the trial examiner committed error in rejecting an offer of proof by counsel for respondent "that this strike has been prolonged by the violence of the union, and that had it not been for the violence of the union, the employees would have voted, through the union, to have returned to work." Of course such evidence would have had no bearing upon the issue of the alleged already accrued 8(a)(5) unfair labor practice which provoked the strike. Nor would the Union, at least in the absence of most extraordinary circumstances, thereby forfeit its status as the certified bargaining representative. Despite instances of violence in the course of such a strike, the Board would not be obliged to withhold an order upon respondent to bargain collectively with the Union, upon future request, as an appropriate remedial measure to undo the effect of the past unfair labor practice. Under the circumstances the Board had considerable discretion in the matter of inquiry into alleged incidents of Union violence during the strike. We do not find that the Board committed any abuse of discretion in excluding respondent's very generalized offer of proof.

A decree will be entered enforcing the order of the Board.

Blanchard Printing Company, Boston, Mass.—6/9/53-(85)

[fol. 460] On the same day, June 9, 1953, the following decree was entered:

DECREE—June 9, 1953

This cause came on to be heard upon the petition for enforcement of an order of the National Labor Relations Board, and was argued by counsel. Upon consideration whereof, It is now, to wit, June 9, 1953, here ordered, adjudged and decreed that the Respondent, Reed & Prince Manufacturing Company, Worcester, Massachusetts, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steelworkers of America, CIO, as the exclusive representative of all production and maintenance employees of the Respondent at its Worcester, Massachusetts, plant, including shipping and receiving room employees and inspectors, but excluding office employees, departmental clerks, executives, foremen, assistant foremen, draftsmen, professional employees, guards, and all supervisors as defined in the Act, with respect to rates of pay, wages, hours of employment, or other conditions of employment.

(b) Soliciting employees who went on strike on January 2, 1951, to abandon their concerted activities, by threats of reprisal, by promises of benefit, or by any other means circumventing the Union as the exclusive bargaining repre- [fol. 461] sentative of such employees.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, CIO, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in collective bargaining or other mutual aid or protection, or to refrain from any of all such activities except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act, as guaranteed in Section 7 thereof.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the United Steelworkers of America, CIO, as the exclusive representative of all the employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Mail to each of its employees to whom the March 2, 1951 letter was sent, and post at its plant in Worcester, Massachusetts, copies of the notice attached hereto as Appendix A. Copies of such notice, to be furnished by the Regional Director for the First Region, shall, after being duly signed by the Respondent's authorized representative, [fol. 462] be posted and mailed by the Respondent immediately upon receipt thereof, and be maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the First Region, in writing within fifteen (15) days from the date of this Decree, what steps the Respondent has taken in compliance herewith.

By the Court: (S.) Roger A. Stinchfield, Clerk.

Appendix A

Notice to All Employees Pursuant to a Decree of the United States Court of Appeals for the First Circuit Enforcing an Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We will not, by threats of reprisal, promises of benefit, [fol. 463] or any other means, solicit employees who went on strike on January 2, 1951, to abandon their concerted activities.

We will not in any manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, C.I.O., or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as authorized in Section 8 (a) (3) of the Act. All our employees are free to become or remain members of this union, or any other labor organization.

We will bargain collectively upon request with the above-named union as the exclusive representative of all employees in the bargaining unit described herein with respect to rates of pay, hours of employment, or other conditions of employment, and if an understanding is reached, we will embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees in our Worcester, Massachusetts, plant, including shipping and receiv-
[fol. 464] ing room employees and inspectors, but excluding office employees, departmental clerks, executives, foremen, assistant foremen, draftsmen, professional employees, guards, and all supervisors as defined in the Act.

Reed & Prince Manufacturing Company (Employer).

By (Representative) (Title).

Dated —— ——.

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Thereafter, to wit, on June 22, 1953, upon motion of respondent, an order was entered staying the decree until further order of Court to permit respondent to file a petition for rehearing.

Thereafter, to-wit, on June 24, 1953, respondent filed the following document captioned petition for rehearing:

United States Court of Appeals
For the First Circuit

OCTOBER TERM, 1952.

No. 4647.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v.

REED & PRINCE MANUFACTURING COMPANY,
RESPONDENT.

PETITION FOR REHEARING.

Respondent, Reed & Prince Manufacturing Co., petitions this Honorable Court to grant rehearing and reargument in the above-captioned case, in which it rendered its judgment and opinion on June 9, 1953 and in support of said petition states to the Court as follows:

The central question presented by this case, in the language of the Court, is "... whether it is to be inferred from the totality of the employer's conduct that it went through the motions of negotiation as an elaborate pretense with no sincere desire to reach an agreement if possible ..." (Op., p. 3).

While recognizing that the Board may not "sit in judgment upon the substantive terms of collective bargaining agreements", *N.L.R.B.* v. *American National Ins. Co.*, 343 U.S. 395, 404, this Court nevertheless asserts that the Board "must take some cognizance of the reasonableness

of the positions taken by an employer in the course of bargaining negotiations" (Op., p. 4) and that "if the employer makes not a single serious proposal meeting the union at least partway, then certainly the Board must be able to conclude that this is at least some evidence of bad faith . . ." (Op., p. 5).

It is on the basis of this as a guiding principle that the Court reaches its general conclusion supporting the Board's Order, even though declining to approve all of the Board's "subsidiary findings of fact" (Op., p. 14) upon which it based its inference of bad faith and even though expressly disapproving of some of these (Op., p. 15) and substituting (or suggesting the possibility of substituting) other such findings of fact not heretofore the subject of litigation in the case.[1]

While we cannot accept the Court's characterization of Respondent as having made "not a single serious proposal" we think the Court's basic position that good faith bargaining requires an employer to make proposals "meet-

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[1]One such suggestion was that the Board might have treated the respondent's written counterproposal of Nov. 22 as indicative of bad faith, because [*inter alia*] it contained no provisions as to wages, grievence procedure, or other major items. We submit that the record would not have supported such a finding on the part of the Board, for there is no contention that this written proposal was intended or was understood to embody everything the company was then willing to put into the contract (B.A. 98). The company had made a wage offer contemplating a substantial increase which was still pending at that time, (B.A. 30, R.A. 100), and also a clause dealing with wage inequities (R.A. 51, B.A. 148-9), had submitted seniority proposals (B.A. 74, 98, 229), had offered to incorporate its vacation plan into the contract (B.A. 129, R.A. 93, 34), and told the union it had no objection to its insurance plan, and other existing practices, if agreed to, going into the contract. (B.A. 187, 188)

Wholly aside from the question, however, as to whether or not the Board might have made such a finding, however—or other findings suggested by the Court—it seems clear that in the absence of such findings, the reviewing court should not have relied on matters not passed upon by the Board to support the Board's ultimate conclusion. In *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94-95, a similar question was present. The court disposed of it by saying—

> "Congress has seen fit to subject to judicial review such order of the Security and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review . . . We merely hold that an administrative order cannot be upheld *unless the grounds* upon which the agency acted in exercising its powers were *those* upon which its actions can be sustained." 318 U.S. 94-95. (Italics supplied).

ing the union at least partway" "with a sincere desire to reach an agreement if possible" is erroneous because it fails to take account of the substantive significance of §8(d) of the amended Act. The Court's view that §8(d) is only "more or less declaratory of the law as it had been expounded in judicial decisions under the original Act..." (Op. p. 4) is clearly correct if it means that §8(d) was designated to reaffirm the law as stated in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1. But, it is of critical importance here to note that the occasion for §8(d) was the Congressional belief that the Board had disregarded the Supreme Court's authoritative exposition of the obligation to bargain. If, as we believe, this subsection operates expressly to negate the idea that some willingness to make concessions is a necessary ingredient of good faith bargaining, the major premise of the Court's opinion in this case seems fatally impaired and a rehearing in order.

According language its ordinary common sense meaning, it is difficult to see how the obligation to bargain in good faith could require a "proposal meeting the union at least partway" in the face of the statutory assertion that "the obligation does not compel either party to agree to a proposal or require the making of a concession..."

But if there be doubt as to the correctness of our position on this matter it is put at rest by the legislative history of this subsection. Section 8(d) is derived from §5(c) of S. 360, introduced in the 80th Congress by Senator Ball. This provision became §8(d) of S. 1126 which was the bill introduced in the Senate as a result of the hearings held by the Senate Committee on Education and Public Welfare. A corresponding but more detailed definition of "collective bargaining" appeared as §2(11) of H.R. 3020, the bill approved by the House Labor Committee. Appended hereto is a collection of the relevant legislative materials, arranged

in three Groups, which bear on the purpose and effect of §8(d).

The materials collected in Group I relate to the general purpose which Congress sought to accomplish by adding this new provision to the Wagner Act. They reveal unmistakably that Congress was specifically determined to correct what it deemed to be the Board's misconstruction of the Act and to require a return to the concept of collective bargaining announced by the Supreme Court in *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, where the Court said:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' ... The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."

It is to be noted that the Court here says nothing about an obligation to meet and confer with a determination to reach an agreement, or "a sincere desire to reach an agreement if possible" (Op., p. 3), or to meet the union "partway" in order to reach an agreement. Instead, it is at pains to assert that the Act did "not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine'..." According to the Court, the obligation imposed by the Act is one to meet and confer,

not to confer with a determination or even a desire to agree.[2]

According to the Court, the Act's reliance is not upon a legislatively imposed obligation to "desire" agreement, but upon the "... theory ... that free opportunity for negotiation ... is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel".

Plainly, both Houses of Congress sought to force a return to this concept of the obligation to bargain collectively and an abandonment of the expanded concept theretofore adopted by the Board.

The materials collected in Group II indicate that Congress focussed on the problem with precision and that, despite the protests of the Board, effectively legislated its intent into law.

The comments of the Board's Chairman, set forth in item a. of Group II, are unmistakably plain. He regarded the proposal to adopt §5(c) of S. 360 as "unthinkable". But, with the modification about to be noted, Congress did just that. It rejected the Board's notion that collective bargaining must be "accompanied by the correlative duty on the part of the other party—to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement" and legislated a return to the *Jones & Laughlin* standard which requires only that an employer meet and confer while remaining free to refuse to make a collective contract.

The language of §8(d) does differ from the language of

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[2] This is not to say that an evident prior determination not to agree to anything in any circumstances would not be indicative of such pervasive bad faith as to amount to a violation of the statutory obligation. But such a determination is not to be inferred from mere evidence of a lack of *desire* to reach agreement.

§5(c) of S. 360 in one respect deemed by the Senate Committee to be sufficiently notable to warrant comment. As reflected in the Senate Committee Report, set forth in item b. of Group II, the word "concession" was substituted for "counterproposal". But, so far as the present case is concerned, this substitution merely emphasizes that failure to meet "the union at least partway" is precisely what the Congress has said shall have no bearing whatever on the fulfillment of the employer's (or the union's) obligation to bargain collectively in good faith. Additionally, it strongly supports our view that the counterproposal submitted by Respondent on November 22 fully met the requirements of the Act and could not, as the Court suggests (Op. p. 15) constitute an evidence of bad faith which the Board "might well have lifted out from the record . . . as indicative of bad faith".

It may also be noted that Section 8(d) of the Act differs textually from Section 5(c) of S. 360 in one additional respect. Section 5(c) of S. 360 required the parties "to meet at reasonable times to confer". Section 8(d) requires the parties "to meet at reasonable times and confer in good faith". The addition of the words "in good faith" do not in our view add anything of substance to the provisions of S. 360. Obviously the Senate Committee did not so regard it and it seems plain that an inarticulate major premise of the statutory command to meet and confer is that the parties do so "in good faith". This is but to say that parties meeting with a positively fixed determination to reach no agreement under any circumstances would not meet the standard of good faith. Plainly, Respondent in this case entertained no such fixed determination. The union at no time claimed that Respondent was unwilling to enter into any contract of any kind.[3] Indeed its leaflet to the em-

[3]The principal union witness indeed conceded that the company had expressed a willingness to entertain some of his proposals at a later date if things worked out satisfactorily during the contract period (B.A. 136).

ployees (R.A. 122-23) reflects its understanding of Respondent's willingness to sign an agreement if certain provisions insisted upon by the union were omitted.

The material in Group III indicates that by accepting the present language of §8(d) instead of the corresponding language of §2(11) of the House Bill, the House managers understood that the Congress was accomplishing substantially the same purpose as would have been effected by the House provision and that,

> "Playing for time, maneuvering for position, showing indifference to the advantages or disadvantages of possible compromises, beginning low and working up or beginning high and working down, pressing for one thing to get something else, trading one point for another, withholding commitments until the agreement takes shape, all this and much else, if they know how to do it, bargainers may use."

Thus since the evidence in this case in no sense reflects a positive determination by Respondent not to reach any agreement, we think that §8(d), textually and as illuminated by unmistakably announced Congressional purpose, effectively reaffirms the proposition announced by the Supreme Court that a "desire" to reach agreement and a willingness to make concessions to that end are in no sense ingredients of the obligation to bargain collectively. Because this Court's basic premise in evaluating the evidence in this case is that such a desire and such a willingness are necessary ingredients of the obligation, it should

grant a rehearing and reconsideration of its judgment in this case.

Respectfully submitted,

(s) GERARD D. REILLY,

(s) JULIUS KIRLE,
Attorneys for Respondent.

REILLY, RHETTS & RUCKELHAUS
1120 Tower Building,
Washington 5, D. C.
Of Counsel
Dated: June 24, 1953

CERTIFICATE.

I, Julius Kirle, of Boston, Massachusetts, Attorney for the Respondent, Reed & Prince Manufacturing Co., hereby certify that the within petition for rehearing is presented in good faith and not for the purpose of delay.

(s) JULIUS KIRLE.

Subscribed and sworn to before me this 24th day of June, 1953.

[SEAL]

(s) EDWIN CONSOLMAGNO,
Notary Public.

My commission expires November 26, 1954.

APPENDIX.

Group I.

(a) *H.R. 3020, as reported, House Committee on Education and Labor, 80th Cong., 1st Sess., p. 6.*

"Sec. 2. . . .

"(11) The terms 'bargain collectively' and 'collective bargaining' as applied to any disputes between an employer and his employees or their representative, mean compliance with the following minimum requirements:

"(A) If an agreement is in effect between the parties providing a procedure for adjusting or settling such disputes, following such procedure.

"(B) If no such agreement is in effect, complying with the following procedure:

"(i) receipt of any proposal or counterproposal of the other party;

"(ii) discussion of such proposal and any counterproposal at a conference with the other party held at a time mutually agreeable to the parties or, in the absence of such an agreement, within a reasonable time after such receipt;

"(iii) continued discussion of the matters in dispute at not less than four separate additional conferences with the other party held within the thirty-day period following the initial conference, unless agreement is sooner reached;

"(iv) if agreement is reached, putting such agreement in writing;

"(v) if agreement is not reached by the end of such thirty-day period, complying with the requirements of clause (vi) before authorizing, conducting, or participating in any lock-out or strike in connection with such dispute;"

(b) *H. Rept. 245, Committee on Education and Labor, 80th Cong., 1st Sess., pp. 19-21.*

"(11) 'Bargain collectively' and 'collective bargaining': The present act does not define these most important terms. Some of the most glaring injustices of decisions of the present Board arise from that omission.

"The present section 8(5) requires an employer to bargain collectively with the representatives of his employees. The Supreme Court, in the *Jones & Laughlin* case (301 U.S. 1), upholding the constitutionality of the act, said:

> "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent an employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine . . .' The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel . . ."

"Notwithstanding this language of the Court, the present Board has gone very far, in the guise of determining whether or not employers had bargaining in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make. The Board has gone so far as to hold and employer's refusal to compel workers to become and remain members of unions, under so-called 'closed shop' arrangements, to be evidence that the employers had not bargained 'in good faith'. (See *Matter of International Filter Co.*, 1 N.L.R.B. 489 (1936); *Matter of Columbian Enameling and Stamping Co.*, 1 N.L.

R.B. 181 (1936); *Matter of Jackson Daily News*, 9 N.L.R.B. 120 (1938); *Matter of Uhlich and Co.*, 26 N.L.R.B. 679 (1940); *Matter of J. I. Case Co.*, 71 N. L. R. B. No. 182 (1946).)

"The Board has held it 'unfair' for an employer to insist that he and the union settle their differences by collective bargaining, instead of submitting them to some form of 'collective litigation' like arbitration (*Matter of Dallas Cartage Co.*, 14 N.L.R.B. 411 (1939); *Matter of Register Publishing Co.*, 44 N.L.R.B. 834 (1942)). Notwithstanding the difficulties of instituting suits against unions under present law and of collecting judgments resulting from their breaking their contracts, if an employer asks the union to take steps making it legally responsible for its contract violations, the Board is apt to say the employer is 'unfair' and punish him for 'refusal to bargain' (*Matter of Jasper Blackburn Products Co.*, 21 N.L.R.B. 1240 (1940); *Matter of Scripts Mfg. Co.*, 36 N.L.R.B. 411 (1941); *Matter of Interstate Steamship Co.*, 36 N.L.R.B. 1307 (1941)). The Board has held that an employer is not 'bargaining in good faith' when he asks the union to agree to a 'no-strike clause' and it has disregarded such clauses when unions have agreed to them (*Matter of Metal Mouldings Corp.*, 39 N.L.R.B. 107, 119 (1942); *Matter of Burgie Vinegar Co.*, 71 N.L.R.B. No. 140 (1946); *Matter of United Biscuit Co.*, 38 N.L.R.B. 778; *Matter of Highland Shoe Co.*, 23 N.L.R.B. 259). Last year a company offered to the union one of the largest raises ever granted in its industry. The offer was the most generous one then being discussed in the industry. However, it fell 5 cents short of meeting the union's demand. The union wished to bargain about the employer's *estimated* and *prospective* profits. Notwithstanding the very intense 'bargaining' that had gone on, the Board accused the company of 'refusing to bargain' (*Matter of General Motors Corporation*, N.L.R.B. Case No. 7-R-1496).

"These cases show that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements. (See T. R. Iserman, Industrial Peace and the Wagner Act, McGraw-Hill Book Co., Inc., New York (1947), pp. 31-35; Harold W. Metz, Labor Policy of the Federal Government, The Brookings Institution (1945), p. 73.)

* * *

"*In view of the Board's rulings on the duty to bargain the committee has deemed it wise to define collective bargaining to mean what the Supreme Court in the Jones & Laughlin case, supra, says it means.* This the bill does in two ways: *First,* it sets up objective standards by which the Board can determine whether or not a party has refused to bargain. In opposing the suggestion that unions, as well as employers, be required to bargain collectively, the Chairman of the Board has stated that whether or not a person is bargaining 'in good faith' requires appraising his 'state of mind'. The possibility of error and injustice when three Board members, none of whom are psychiatrists, undertake to do this is very great, as can be seen from decisions of the Board itself. The committee therefore takes the question out of the realm of speculation, guess work, and, too often, bias and prejudice, and provide that 'free opportunity for negotiation' that the Supreme Court said the act should bring about. Since the bill requires unions as well as employers to bargain, the committee's doing this is as important to them as to employers.

"When parties have agreed upon a procedure for settling their differences, and the agreement is in effect, they will be required to follow the procedure or be held guilty of an unfair labor practice. Most agreements provide procedures for settling grievances, generally including some form of arbitration as the last step. Consequently, this

clause will operate in most cases, except those involving the negotiation of new contracts.

"*Bargaining procedure.* — In contract negotiations, or when for any reason no procedure for settling disputes is in effect, each of the parties is required to take these steps:

"1. Receive the other party's proposals and any counterproposals. (Counterproposals may be made later, unless the parties have agreed otherwise.)

"2. Discuss the proposals and any counterproposals at a conference at a mutually agreeable time or within a reasonable time. (It is important that the parties meet face to face if that is at all possible, and that each side, at the very least, listen to the other side state and explain his proposals or counterproposals.)

"3. Continue discussing the proposals and counterproposals at not less than four separate additional conferences within a 30-day period after the first conference, unless agreement is sooner reached. (Bargaining is a difficult and highly refined art, and employers and unions have many techniques for arriving at the bargains they wish to reach.

> "Playing for time, maneuvering for position, showing indifference to the advantages or disadvantages of possible compromises, beginning low and working up or beginning high and working down, pressing for one thing to get something else, trading one point for another, withholding commitments until the agreement takes shape, all this, and much else, if they know how to do it, . . . bargainers may use.

T.R. Iserman (op. cit., pp. 31-33). Congress ought to assure to each side a full opportunity to use its bargaining abilities. It ought not to say how the parties may use their

abilities. The Board has tried to do that, with unfair results.)

(c) *S. 360, 80th Cong., 1st Sess., introduced Jan. 27, 1947.*

"Sec. 5. . . .

"(c) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times to confer with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or the settlement of any question arising thereunder, but such obligation does not compel either party to agree to a proposal or require the making of a counterproposal."

(d) *Analysis of S. 360 (Hearings, Committee on Labor and Public Welfare, United States Senate, 80th Cong., 1st Sess., on S. 55 and S.J. Res. 22, Part I, p. 304 [hereinafter referred to as "Hearings"]).*

"Another amendment to this section defines the term 'bargain collectively' and makes it clear that the duty to bargain does not require either party to agree to or to make a counterproposal. This was the original intent of this subsection, as is shown by Chief Justice Hughes' comment upon it in the *Jones and Laughlin* case (301 U.S. 1), but the Board itself in recent years has tended to read more content into this subsection than that decision of the Supreme Court would indicate was justified."

Group II.

(a) *Statement of Paul M. Herzog, Chairman, National Labor Relations Board, on pending labor legislation before the Senate Committee on Labor and Public*

Welfare, March 6, 1947; Hearings, pp. 1886-87; 1913-14.

"Mr. Herzog: All right, thank you very much, Mr. Chairman.

"I would like to call attention particularly to the last paragraph on page 30, which has to do with the definition. It seems to me that S. 360 applies, or seeks to apply, a mechanical test to a state of mind. It suggests that all that is necessary is to meet a lot, meet a lot, meet a lot. Well, there is no requirement that there be good faith; no requirement that there be a desire or evidence of a desire to reach agreement. Now, in the last paragraph we point out something I think is pretty important, because it has been misunderstood—and I think it is very easy for people so to misunderstand it; it is really no one's fault.

"The implication in the amendment certainly is that the requirement to make a counterproposal is the same thing as the requirement to make a concession. It just is not. A counterproposal is not a concession. Now, I am going to read from page 30, to show that they are vastly different things. [Reading:]

> "This does not mean, as is frequently and carelessly asserted, that an employer must make concessions. A counterproposal and a concession are vastly different things; wholly valid counterproposals may merely state existing conditions. The failure to make a counterproposal (as distinguished from a concession) may be evidence of bad faith—that is, of an intent under no circumstances to reach agreement—but that is all. And we have found in many cases that an employer has bargained in good faith even though he made no counterproposals, let alone concessions."

"I think the main thing is to draw that distinction. The requirement to make a counterproposal does not mean, for example, that if a union asks for a dollar, that then the employer has to give or offer 10 cents. It does not mean that at all.

"If the employer, on the other hand, says simply that he is not going to do business with the union, he will simply not even incorporate the existing conditions in a contract and give way on nothing, then he is certainly refusing to bargain. The fact that he does not want to do anything about giving that 10 cents is some evidence of his state of mind; but there is no requirement that he offer that 10 cents.

"Senator Aiken: Well, if the employer pointed out where some demand of the union was unwarranted, as perhaps it has been pointed out, would that constitute a counterproposal?

"Mr. Herzog: It might very well. It would be very important; it could be part of his argument for not giving a concession.

"Senator Aiken: In other words, he could point out where the union was not entitled to their full demands, and that would be a counterproposal just as much as if he had offered a little more than he had offered before.

"Mr. Herzog: Well, it could be. Now, on this counterproposal and concession business, in a lot of these cases the main trouble comes because they do not or will not give their reasons for their position. That is something that the American people do not like." [p. 1886-1887]

* * * * *

"(2) There is serious objection to the definition given to collective bargaining in the proposed amendment. The proposed section would dilute the obligation on both unions and employers to bargain to a mere duty 'to meet * * * to confer.' What is omitted is significant; namely, the obliga-

tion to endeavor in good faith to reach an agreement. As the Supreme Court has stated (*N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332), 'The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made.'

"This proposed change is in some respects the touchstone of the committee's problems. It applies a mechanical test to a state of mind. To those genuinely interested in encouraging collective bargaining, any such change is unthinkable; it could only be devised by one uninterested in that result. Before passing the act the Senate stated (Senate report on NLRB, 74th Cong., 1st sess., No. 573, p. 12), 'a guarantee of the right to bargain collectively is a mere delusion if it is not accompanied by the correlative duty on the part of the other party—to negotiate with them in a bona fide effort to arrive at a collective-bargaining agreement.'

"This does not mean, as is frequently and carelessly asserted, that an employer must make concessions. A counterproposal and a concession are vastly different things; wholly valid counterproposals may merely state existing conditions. The failure to make a counterproposal (as distinguished from a concession) may be evidence of bad faith—that is, of an intent under no circumstances to reach agreement—but that is all. And we have found in many cases that an employer has bargained in good faith even though he made no counterproposals, let alone concessions (see, e.g., *Easton Publishing Co.*, 19 N.L.R.B. 389; *Allied Yarns Corp.*, 26 N.L.R.B. 1440; *National Hardware Co.*, 55 N.L.R.B. 71; *Central Minerals Co.*, 59 N.L.R.B., 757).

"To amend the act to say, as section 5(c) of S. 360 would do, that 'the obligation does not . . . require the making of

a counterproposal' is to deprive the Board of one of the readiest indicia for determining whether bargaining is being conducted in good faith." [pp. 1913-14]

(b) *S. Rept. 105, Report of Senate Committee on Labor and Public Welfare to Accompany S. 1126, 80th Cong., 1st Sess., p. 24.*

"Section 8(d) contains a definition of the duty to bargain collectively and, consequently, relates both to the duties of employers to bargain and labor organizations to bargain under sections 8(a)(5) and 8(b)(3), respectively. The definition makes it clear that the duty to bargain collectively does not require either party to agree to a particular demand or to make a concession. It should be noted that the word 'concession' was used rather than 'counterproposal' to meet an objection raised by the Chairman of the Board to a corresponding provision in one of the early drafts of the bill."

Group III.

House Conference Rept. 510 on H.R. 3020, 80th Cong., 1st Sess., p. 34.

"(7) The House bill contains a definition of the term 'bargain collectively' for the purposes of the duties imposed on both parties in the amended section 8 of the Labor Act to bargain collectively with the other. By reason of a number of decisions of the Board, which in effect required an employer to make or offer concessions to show that he was bargaining in good faith, the House definition proposed an objective test for determining what constituted bargaining collectively. It required first that the parties

follow the procedure specified in an agreement between the parties if such an agreement was in effect, and, if no such agreement was in effect, discussion between the parties at a stated number of meetings of the various proposals and counterproposals. If agreement was reached the agreement was to be put in writing. Neither party was to be required to reach an agreement, accept any proposal or counterproposal or submit counterproposals.

"In addition, neither party was to be required, under his duty to bargain collectively, to discuss any matter other than those (which were set out in detail in the House bill) which the House considered to be within the proper scope of compulsory bargaining.

"As part of the procedure of collective bargaining, the House bill required that the employees themselves, in a secret ballot, vote on the question of whether to reject the employer's last offer of settlement, and made it a violation of the duty to bargain to call a strike or lockout unless upon such ballot a majority of the employees eligible to vote were in favor of such rejection.

"The Senate amendment did not, in the definition section, contain any definition of 'collective bargaining', but did contain (sec. 8(d)) a provision stating what collective bargaining was to consist of for the purposes of section 8. It was stated as the performance of the mutual obligation of the parties to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or with respect to the negotiation of an agreement, or with respect to any question arising thereunder; and the execution of a written contract incorporating any agreement reached if desired by either party. This mutual obligation was not to compel either party to agree to a proposal or require the making of any concession. *Hence, the Senate amendment, while it did not prescribe a purely objective test of what constituted col-*

lective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties.'' (Italics supplied).

Thereafter, to wit, on June 26, 1953, the following order of Court was entered:

ORDER OF COURT

June 26, 1953.

It is ordered that respondent's petition for rehearing filed June 24, 1953, be, and the same hereby is, denied.

By the Court:

(S.) ROGER A. STINCHFIELD,
Clerk.

Thereafter, to wit, on July 1, 1953, upon motion of respondent, an order was entered staying the decree of this Court until further order of this Court.

[fol. 485] Clerk's Certificate to foregoing transcript omitted in printing.